This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

LBC
JWR
XJ

v.2

CASES

DECIDED IN

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1826, 1827.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,
ADVOCATES.

VOLUME II.

WILLIAM BLACKWOOD, EDINBURGH;
T. CADELL, AND M. STEVENS AND SONS, BELL-YARD,
LINCOLN'S INN, LONDON.
MDCCCXXIX.

LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY
LAW DEPARTMENT

a-56428

JUL 23 1901

In presenting these Reports to the Public it would be extremely idle to expatiate on the importance and necessity of the publication of the Decisions of the Court of last resort. Suffice it to say, that from local circumstances, it is impossible that the people of Scotland can have the same facility of access to information relative to the Decisions of the House of Lords, which they have to those of the Courts situated in their own country; and that it must always be matter of deep interest to them to be made acquainted as early as possible with the opinions there entertained, and the judgments there pronounced on questions submitted to their consideration.

But although this is admitted on all hands, yet the knowledge of these decisions has been hitherto very sparingly, and very tardily, communicated to them; and no collection (at least of those of more recent date) has been made, devoted exclusively to Scottish cases, and embracing all those in which judgment has been pronounced.

To obviate in some degree this defect, a series of Reports was lately commenced from February 1821, which it is proposed to continue, and to form part of those which are now offered to the Public. Instead, however, of de-

laying the publication of those cases which have been decided during the present Session of Parliament, it has been considered more expedient immediately to give Reports of them, and to bring up the arrears as rapidly as can conveniently be done, and so prevent any farther accumulation of them.

With regard to the plan on which these Reports are to be conducted, a very few words will be sufficient. It is intended to give every case in which judgment has been pronounced, and to introduce the opinions of the Judges both in the Court of Session and the House of Lords; so that, in this way, a full and correct view will be presented of the grounds on which the decision in each of these tribunals has been placed. Perhaps, in some instances, it may be thought that the Reports are more ample than the nature of the cases requires; but, in general, it will be found that if they do not involve some legal principle, they convey information available at least in a practical point of view.

CASES

DECIDED IN THE HOUSE OF LORDS

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1826.

The Earl and Countess of STRATHMORE, Appellants.— *W. Brougham.*
WILLIAM LAING, Respondent.

No. 1.

Royal Palace—Poinding.—Held ex parte (reversing the judgment of the Court of Session), That the privilege of Royal Palace protects against poinding and letters of open doors within the precincts of the Palace of Holyrood-house, although his Majesty be not residing there when the diligence is attempted to be executed,—the Palace being kept up as a place of royal residence.

Feb. 22, 1826.

1st DIVISION.
Lord Alloway.

THE Abbey of Holyrood-house was founded by King David the First in the year 1128, and among other privileges he endowed it with that of a Sanctuary. The Charter bears, 'Et prohibeo 'ne aliquis capiat pandum super terram sanctæ crucis, nisi ab- 'bas ejusdem loci rectum et jus facere recusaverit.' In 1528, James the Fifth erected at the south-west corner of the Abbey a royal palace; and on the suppression of religious houses in 1587, the whole domain, with the privileges thereto attached, was vested absolutely in the Crown. The Palace continued to be the principal residence of the Monarch till the accession to the throne of England, and was thereafter occasionally resorted to. It was, however, always kept up as a royal residence—was made the depot of a guard of honour—was given as a royal place of abode to the Princes of the House of Bourbon—and was more recently occupied, under a royal license, by the Archdukes of Austria and Prince Leopold. In 1822, King George IV. occupied the Palace, convened his Privy Council, and held his Courts there with all the appropriate indications and insignia of royalty.

Feb. 22, 1826. In 1815, the Countess of Strathmore, who was then Lady Campbell of Ardkinglass, obtained from his late Majesty a royal warrant to occupy and possess certain apartments in the Palace, which was there designated, 'our Palace of Holyrood.' She accordingly, in virtue of this warrant, took possession of certain apartments in the Palace, the furniture of which belonged to his Majesty, with the exception of some valuable pictures which were the property of her Ladyship and of the Earl of Strathmore, whom she had married while residing there.

In 1820, William Laing, bookseller in Edinburgh, describing himself as a creditor of the Earl and Countess of Strathmore, gave them a charge of horning for payment of his debt, and on expiry of the charge, attempted to force an entry into the Palace for the purpose of executing a poinding of the pictures, which were in the royal apartments. There being reason to suspect the validity of these proceedings, from the debtors being furth of the kingdom, and the charge having been on inducie of only six days, a second charge on sixty days was given. On its expiry, the messenger attempted to effect a forcible entrance to execute the poinding, and being denied admittance, he returned an execution of lock-fast doors. Laing then applied for and obtained letters of open doors; and he procured the concurrence of the Baron Bailie to the poinding 'over effects situated 'within the Sanctuary of Holyrood-house.' A bill of suspension and interdict having been presented by the Earl and Countess of Strathmore, and also a separate bill by the Officers of State, it was contended by the former, that a poinding within the Sanctuary was unlawful, and by them and the Officers of State, that at all events it was incompetent within the Royal Palace. Lord Meadowbank refused the bill for the Earl and Countess; and Lord Gillies refused that by the Officers of State. Both of these parties having reclaimed to the Second Division,

Lord Robertson observed,—The first question is, how far it is lawful to poind within the Sanctuary? There is no doubt a privilege attached to it of protecting the person when the debtor is booked—but there is no such question here. The point is, whether it be lawful to execute diligence against the goods of the debtor which are situated there? I cannot discover any authority for protecting them; and so far I am clearly of opinion that the diligence is lawful. On the second question, whether it is competent to execute a poinding within the Royal Palace, there is more difficulty. In every country the place of the King's own residence stands in a different situation from his other domains. It possesses a peculiar jurisdiction, which is vested in

a special officer, and is exclusive of that of all others. This is bestowed to prevent broils and disturbances, and out of respect to the Sovereign. But this privilege is limited to the place of his actual residence—It rests on the respect due to the person of the Sovereign, and does not belong to every house where he may at one time have resided. Feb. 22, 1826.

Lord Glenlee.—I am of the same opinion. At one time it was not lawful, either by the authority of this or of any other Court, to enter the Palace of the King to execute diligence. But at that time there were officers appointed by his Majesty, under whose sanction diligence might have been executed. According to the genius of our law, there is an extreme tenderness for the person of a debtor, but a great anxiety to prevent his funds being removed from the reach of his creditors. In attempting, however, to execute diligence against effects within the royal precincts, the consent of his officer must be obtained. This has been got, and so far, therefore, as regards the bill of suspension by the Earl and Countess of Strathmore, I think it unfounded, and the one by the Officers of State unnecessary, as the goods of the King cannot be attached for the debt of these parties.

Lord Bannatyne.—We all know that the Sanctuary affords a protection to the person of a debtor, but to this the privilege is limited. If this were to be held a Royal Palace, I would doubt the competency of the poinding; but in the circumstances I do not think we can regard it as such.

Lord Craigie.—I conceive that there is no difficulty in the case. The proceeding is sanctioned by the King's officer, which I apprehend is sufficient.

Lord Justice Clerk.—There are two questions entirely separate—the first regarding the privilege of the Sanctuary—and the other that of the Palace. I agree that the Sanctuary affords no protection against the diligence of the law in relation to goods; but I have much doubt as to the competency of a poinding within the Palace. It happens to be situated within the Sanctuary, and this leads to some confusion; but let it be supposed that it were in the Castle, or at Linlithgow, the question will then be purely presented. Now, there are here almost all the usual appendages of a Royal Palace:—The domestic establishment is appointed and paid by his Majesty;—there are also royal apartments, where the King's guests have been occasionally accommodated; and there is a guard of honour. It therefore stands very much in the situation of the Palace at Kensington, where it has been held that diligence is unlawful. The question then is, Can effects situated within this Palace be exposed to diligence, and more especially,

Feb. 22, 1826. can the doors of the Palace be forced open by letters to that effect? Looking at our authorities, and at the general principles of our law, I think that diligence cannot proceed against the property of the King situated there; and if not, can you attach the effects of his subjects situated there? On this I have not formed a decided opinion, but the case of the Palace of Kensington comes extremely near to this one; and, therefore, while I throw out these observations as doubts, I think that we ought to pass the bill to try the question.

The other Judges having acquiesced in this proposal, the bills were passed simpliciter.

The letters of suspension by the Earl and Countess having been debated before Lord Alloway, his Lordship, on the 7th December 1821, found, 'that there is no precedent for the Sanc-'tuary of Holyrood-house, or for the Palace, affording any pro-'tection to the effects of debtors residing therein, so as to relieve 'them from poinding;—that the suspenders' reasoning could 'apply only to the Sovereign's residence in the Palace, whose 'presence ought not to be disturbed by the intrusion of persons 'into the Palace without his permission, or that of the keeper 'appointed by him;—that the diligence in question was autho-'rized of the Baron Bailie of the Abbey, the officer appointed by 'the hereditary keeper of the Palace;' and therefore repelled the reasons of suspension, and found the letters orderly proceeded. To this judgment the Court, on petition and answers, adhered on the 18th February 1823, and found the Earl and Countess and their mandatory, jointly and severally, liable in expenses.*

Lord Hermand observed,—The answers by Laing are quite satisfactory. It is the execution of caption, and not the attachment of moveables within the Palace, which creates a violation of the privileges of the Palace. In England they merely extend to the protection of the person.

Lord President.—I am of the same opinion; and the reason why a caption is not allowed to be executed is, that it is to be presumed that every one within the palace is engaged in the service of the King.

Lord Gillies.—I refused the bill of suspension, and I adhere to my original opinion.

Lord Succoth.—My only doubt arises from the practice in England; but in the case of the Palace of Kensington, one of the members of the royal family was residing there.

---

* See Shaw and Dunlop's Cases, Vol. I. No. 169, and Vol. II. No. 200.

Lord Balgray.—I concur; and the only doubt I had was, whether the concurrence of the Bailie had been correctly got. Feb. 22, 1826.

The Earl and Countess appealed against these judgments; but William Laing, the respondent, making no appearance at the bar of the House of Lords, the case was heard ex parte.

Appellants.—The King's person is inviolable; nor can his presence be disturbed, whether he be actually or virtually present, by the executing of legal diligence against any of his lieges or their property. This protection is given to a subject, when within the precincts of a royal palace, not as an indulgence, but because an indignity would be offered to Majesty. It is one of the privileges arising out of the King's prerogative, and holds equally in Scotland as in England. It extends not only to the King's dignified officers, but to the servants of the Palace. It protects the representatives of Majesty,—ambassadors, judges, courts of justice, &c. There is no necessity for a precedent. The King's prerogative needs no statute, or dictum, or judgment of a court. That there is no precedent of poinding or executing letters of open doors within the Palace being declared irregular, is a powerful fact in favour of the appellants. We never could have arrived at the present time without such a breach of decency being attempted, if even the most distant doubt had been entertained on the point. Practice is decidedly against the respondent. It is admitted that within the Abbey of Holyrood-house and its privileged domains, a caption cannot be executed; but it is alleged a poinding and letters of open doors may. The privileges of the Abbey, however, as a sanctuary, and the privileges of the Palace, are quite different. Poinding may or may not be competent within the Abbey, but that cannot affect the royal prerogative attaching to a palace. The Baron Bailie only concurred to a poinding of the effects within the *Sanctuary*. But it is of no consequence to the legal argument whether he concurred or not. It was contended, however, in the Court below, that Holyrood-house was not entitled to the privilege arising from the royal prerogative;—that it is a different case where a palace is the actual royal abode, and where it is not. But once a palace, always a palace;—and Holyrood-house has been so used and occupied from time to time, as to the reigning monarchs seemed meet. The King has many palaces, but he cannot personally occupy them all at once. It is impossible to say how soon it may please a monarch to change his residence. As far as the royal prerogative is concerned, Holyrood-house is as much a palace as it was in the days of the Stuarts.

Feb. 22, 1826. *Lord Gifford.*—It is admitted that within Holyrood-house the person of a debtor is protected?

W. Brougham.—We are afraid that protection is in that case put upon the plea of sanctuary—the Abbey privilege.

Lord Gifford.—It is, in the pleadings, put on the Palace.

The House of Lords ordered and adjudged that the Interlocutor complained of be reversed.

Lord Gifford.—My Lords, the question here is, whether the diligence of poinding, accompanied by letters of open doors, which is an authority to enter forcibly the house and apartments, against the goods and effects of a person residing in the Palace of Holyrood-house, can be there legally executed. It is a matter of regret that I have not had the advantage of knowing on what precise grounds the Court below proceeded in giving the judgment appealed from; nor have I had the assistance of the arguments which might have been used by the respondent. This last circumstance made me feel it a duty to look at the case with more attention and minuteness, than would otherwise have been required. There is not much to be found in the law of Scotland as to the privilege in question.—(His Lordship here described the locality of the Abbey and Palace.)—Your Lordships thus see that there remains in Scotland the privilege which formerly belonged to abbeys. It so happened, that within the precincts of this sanctuary, and attached to the Abbey, a Royal Palace was built, which became the residence of the monarchs of Scotland. It is admitted that this Palace still retains the semblance of a royal residence—that it has a guard of honour—officers heritable and otherwise—that it was so described in the royal warrant granted to Lady Strathmore to occupy the apartments assigned to her;—and when his Majesty lately went to Scotland, he held his Court there. It is not disputed that this privilege, which I believe exists in all civilized countries, would protect against the diligence complained of, if the King actually resided there.—See Ersk. Institutes (4. 3. 25.), where the author talks of Holyrood-house as a royal palace.—This privilege is given, not merely because otherwise the King might be deprived of the services of his domestics, but that it is not seemly that the royal palace, or the royal presence, should be exposed to be made a scene of disturbance or confusion. As to actual residence, that point came before the Court of King's Bench, in a question relative to Kensington Palace. The same objection as here was there made. But the Court held that actual residence was not necessary. In the present case, the Lord Ordinary seems to have thought, that because there was no precedent, therefore that was a reason why the privilege should not attach to stay this diligence. I do not see that the privilege requires a precedent to support it. It is admitted that there is no instance in which a poinding within the royal apartments has been attempted, and the very absence of such instance is rather favourable than against the privilege. But the question is, whether Holyrood-house

is not to be considered as a Royal Palace? and if so, whether this privilege, which attaches not to the person or goods, but to the place, should or does afford a protection against the diligence complained of, although the King may not have resided there for a great many years? Now looking to the existing state of the Palace, the ceremonial still kept up there, the royal permission to reside, and the other circumstances all tending to show that it is to this hour viewed as a palace of the King—and considering that this privilege in Scotland is the same as the privilege recognized and sanctioned here, I cannot agree that the privilege does not attach and save the effects in the royal residence from being carried off by poinding. The diligence granted here was actually to force the apartments. As to the permission given by the Baron Bailie of the Abbey, it was a permission to poind, not to use letters of open doors; and it applied to the Sanctuary, and did not bear to extend to the Palace. But here the privilege claimed is not what attaches to the Sanctuary, but to the Palace; and the circumstance of the Palace being placed within the precincts of the Sanctuary cannot affect or impair the privilege of the Palace. In absence, therefore, of all authority to show that this diligence had ever been attempted before—it being unquestionable that Holyroodhouse has not been abandoned as a Royal Palace by his Majesty, and that actual presence of the King is not necessary to preserve the existence of the privilege—however much I may deplore that my opinion does not coincide with that of the Court below, I cannot move your Lordships to affirm the judgment brought before us. I may add, that, although the question was not decided on its merits, I perceive that the Second Division, on advising the Bill of Suspension presented by the Officers of State, entertained sentiments different from what have led to the judgment. Feb. 22, 1826.

Appellants' Authorities.—Maitland's History, p. 144; Ross's Lectures, v. 1, p. 333—144; 3 Coke, 45, p. 140; 2 Raymond's Reports, 978; 4 Campbell, p. 45; and 10 East's Reports, p. 578; Chitty on Perogative, c. 14.

J. Richardson, Solicitor.

Dr Balmanno, Appellant.—*Keay—Jno. Campbell.* No. 2.
Duncan M'Nee, Respondent.—*Adam—Abercrombie.*

Prisoner—Indefinite Payment—Bankrupt.—A creditor having drawn a dividend from the sequestrated estate of his debtor upon the sum total of a debt payable by four instalments, of which the two last were not yet due,—Held (reversing the judgment of the Court of Session) that the dividend was not imputable towards the total extinction of the first and second instalments, but was to be considered as a payment of so much on each pound of the whole debt.

Dr Balmanno, who was proprietor of a druggist-shop in Glasgow, sold the whole concern in 1820, with its debts, utensils, and stock, to Duncan M'Nee, for £1800. M'Nee, along with two co-obligants, John M'Nee and John Wilson, gave a Feb. 24, 1826.

1st Division. Lord Meadowbank.

Feb. 24, 1826. bond for the price, the principal to be paid by four instalments of £450 each—the first instalment on 1st July 1821; the second on 1st July 1822; the third on 1st July 1823; and the fourth on 1st July 1824; with interest on the whole sum from the 1st of July 1820.

Duncan M'Nee's estate was sequestrated on the 9th February 1822, under the Bankrupt Statute, 54 Geo. III. c. 137. At this date, so far as related to the bond, Dr Balmanno had received £100 towards payment pro tanto of the first instalment, due on the 1st July 1821. By the 47th section of the Bankrupt Statute, it is enacted, 'That in all questions upon this act, persons 'to whom the debtor is under obligation to pay money at a cer-'tain future time, shall be accounted creditors de presenti for 'the amount of the money, discounting the interest to the term 'of payment specified in the obligation, and may prove their 'debts in the same way as other creditors, and shall be entitled 'to the rateable dividends accordingly.'

Under this clause, Dr Balmanno ranked on the bankrupt estate for £1840, 3s. 6d., being the whole balance due on the bond, with interest on the sum total (according to the stipulation in the bond) to the date of sequestration. He then put his bond on record, and having raised diligence on it, he incarcerated M'Nee on 21st May 1822, for payment of the first instalment of £450, which was due on the 1st of July 1821, under deduction of the partial payment of £100.

The second instalment of £450 became payable on 1st July 1822, making the amount (deducting the £100) then exigible £800.

On the 17th of May 1823, a dividend was paid from the bankrupt estate of 10s. 2½d. per pound, which, calculated on the ranking of £1840, 3s. 6d., amounted to £939, 5s. 1d. On the 20th, John M'Nee, one of the co-obligants, paid £500 to account of the bond, and John Wilson, the other co-obligant, granted bills at four, eight, and twelve months, for a composition of 2s. 6d. per pound; so that at this time Dr Balmanno had received in cash upwards of £1400, while the debt actually due was only £800, exclusive of two years' interest. Immediately on receiving these payments, Dr Balmanno restricted the diligence, by an indorsation on the caption, to the balance of the principal of the 1821 instalment and the interest which had accrued subsequent to the sequestration, on the principle of applying the whole composition to the whole debt, and, of course, to each instalment proportionally. He made a similar restriction with reference to the compositions paid by the co-obligants.

The second instalment of the bond had been due since July 1822, and for this Dr Balmanno used diligence on 20th May 1823, against M'Nee in jail, restricting the caption to £40, as the balance due after deducting from this instalment the rateable proportion of the composition received. Feb. 24, 1826.

In November 1823, M'Nee presented to the Court of Session a bill of suspension and liberation, praying for suspension of the diligence executed in relation to the first and second instalments; and in support of his bill, he maintained that he was entitled to apply the whole dividend received by Dr Balmanno, in extinction of the instalments actually payable at the date of the diligence; so that both of these instalments had been more than paid in the month of May preceding.

The bill having been passed without caution by Lord M'Kenzie, on advising with the First Division, and Lord Meadowbank having reported the case to the Court on informations,—

Lord Hermand observed,—Although the statute authorizes a creditor to rank for a future debt discounting interest, and to receive payment of the dividends; yet this cannot entitle him to detain his debtor in prison for a sum not yet payable.

Lord Balgray.—There is at first sight a conflict of legal rules, arising from those established by the common law and those by the Bankrupt Act. When the first caption was executed, there was nothing paid except £100; so that the diligence was at this time lawful. But then Dr Balmanno, in virtue of the Bankrupt Statute, ranked for and drew a dividend on the whole debt. When, therefore, he received that payment, he was bound to impute it to the part of the debt which was actually due; and, at all events, he was not entitled to execute diligence for the part which was not payable, while he had full payment in his pocket of the instalments then due. The question as to the legality of the diligence must be decided by the rule of the common law, and it is clear that, according to it, Dr Balmanno was not entitled to detain M'Nee in prison, and, therefore, that the diligence must be suspended.

Lord Gillies.—This is a question of some difficulty, but my opinion is in favour of M'Nee. The sole object of the Bankrupt Statute was to facilitate and equalize the payment of the debts due to the creditors. This was intended both for their benefit, and eventually for that of the bankrupt. But it is contrary to its spirit to hold that a creditor can incarcerate his debtor in circumstances which he could not do under the common law. Here the debt was payable in four instalments, and after the second fell due, Dr Balmanno received out of his debtor's estate

Feb. 24, 1826. more than he could exact at common law. He ceased therefore to be a creditor to the effect of doing diligence; and it would be a libel on the Law of Scotland to say, that in such a case a creditor might incarcerate his debtor before the term of payment.

Lord President.—I am of the same opinion. This question must be governed by the common law. The rules of the Bankrupt Statute do not apply to it. They relate merely to the ranking of the creditors among themselves, and can have no effect in a question as to the lawfulness of diligence; and therefore, as Dr Balmanno had received more than was payable, he could not lawfully put his diligence in force.

Lord Succoth.—I am of the same opinion.

The Court therefore suspended the letters simpliciter—found Dr Balmanno liable in expenses, and on the 25th May 1824, refused a petition without answers.*

Dr Balmanno appealed against these judgments.

Appellant.—The point is very simple, and resolves into a narrow question of law, Whether or not the dividend paid to the Appellant must be held to have extinguished out and out the first and second instalments then due, or to spread over the whole sum for which the bond was granted; thus leaving at the time when diligence was used a certain portion of the two first instalments unsatisfied. The payment here must be regulated by statute. The act enables the creditor to prove the whole debt, although the term of payment has not arrived; and the dividend on this debt can be held as nothing else than a payment of so much of every pound of the sum proved. Any other doctrine would lead to the greatest injustice. For instance, in the case of the three first instalments being unsecured, but the last being protected by a cautioner, according to the respondent's reasoning, the dividend would extinguish the unsecured instalments, and throw the whole of the fourth on the cautioner. In the same way, in the case of these several sums having been assigned away, or where the instalments had formed the contents of separate bills, and had been indorsed away, the assignee to the last instalment, or the holder of the last bill, would receive nothing, although the dividend is calculated upon the whole amount of the instalments added together. The point has accordingly been settled in the law of England, in Martin v. Bricknell, 2

* See 3 Shaw and Dunlop's Cases, No. 42.

Maule and Selwyn's Reports, p. 39, in the way contended for by the appellant. The appellant could not have incarcerated the respondent for any of the instalments until they actually fell due; nor could he have proved the whole debt, the day of payment not having arrived, except by aid of the statute. But having proved, the dividend is calculated upon the whole debt, and must go, not to extinguish any particular part or portion which happens to be first due, but is a payment of so much in every pound of which the whole is composed. Feb. 24, 1826.

Respondent.—The appellant was not entitled to impute the dividend in payment of distant instalments—The statute does not countenance such a doctrine—It was enough to allow debts with future periods of payment, to be proved as if already due; but the Legislature did not mean to go farther. The appellant did not raise his diligence under any clause in the Sequestration Statute of Scotland, but exercised a common law right. The application of the dividend must therefore be governed by the rules of the common law, and consequently extinguish totally the instalments which had fallen due. If so, then when the diligence was used, the respondent was not due the appellant the sums for which he was incarcerated. If the payment had come from any other source, the first instalments would have been extinguished, and only the balance applied to the more distant instalments. In the case put of cautioners for the last instalment, distinct and separate debts are created, and the cases no longer remain parallel.

Lord Gifford.—But could you reason the case differently with the cautioner than with the principal? What is the effect of the payment of this dividend? Is it not an extinction of so much of every pound?

Abercrombie.—It does not seem to us that such is the necessary conclusion. Besides, independent of the expressed desire of a party, the application of a payment may be gathered from facts and circumstances; and it is plain that M'Nee must have intended the payments to save him from incarceration.

The House of Lords ordered and adjudged, 'that the interlocuters complained of be and the same are hereby reversed, 'and that the letters be found orderly proceeded.'

Lord Gifford.—My Lords, this is a case of considerable importance. It appears that the respondent became insolvent, and that his effects were administered under a sequestration. Dr Balmanno, the appellant, not only came in under that sequestration, but also used diligence against the

Feb. 24, 1826. respondent; and it is admitted that, by the law of Scotland, as it now stands, it is competent for the party coming in under a sequestration, not only to take the benefit of that sequestration, but to use diligence against the party. However hard that law may appear to your Lordships to be, that is the law of Scotland, and your Lordships, sitting in a judicial character, can only administer the law as it stands, without attempting a correction of that law, which correction must be applied, if at all, by the Legislature itself.

My Lords, in this case the facts are briefly these. The respondent, Mr Duncan M'Nee, having purchased a concern which was carried on by Dr Balmanno, as a druggist, in Glasgow, entered into a bond, with two sureties, to secure to Dr Balmanno the sum of £1800. That sum was to be payable by certain instalments, the first to become due on the 1st of July 1821, and the remaining three at the end of the three following years, together with interest upon the whole debt till the instalments were paid. After this bond had been given, Mr Duncan M'Nee became, as I have stated to your Lordships, insolvent. A sequestration was awarded against him, and, as it is stated at the bar, with the concurrence of Dr Balmanno himself.

By the Bankrupt Law of Scotland, a party, to whom a debt is due, which is payable in futuro, may come in as a creditor de præsenti for the whole of his demand, making a rebate for the amount of interest.—(His Lordship here read clause 47th of the Bankrupt Act.)—Under this section of the 54th of the late King, Dr Balmanno proved the whole amount of the debt, namely, the sum of £1800, it being payable with interest. The interest was not proved under the sequestration, but he proved as for a present debt, the whole sum of £1800.

My Lords, a dividend was declared on Mr Duncan M'Nee's effects of 10s. 2½d. in the pound—the amount is not material. Dr Balmanno recorded his bond, and incarcerated Mr M'Nee, after some of those instalments had become due, for those instalments; and then, when he was paid the dividend, he made a deduction from the amount of the debt due by Mr Duncan M'Nee, according to the proportion of the dividend upon the instalment, in respect of which he had used diligence. This gentleman, Mr M'Nee, on the other hand, contended that the dividend declared under the sequestration, to the amount of 10s. in the pound, (speaking in round numbers,) amounting therefore to £900, ought to be applied in the first instance to the total payment of the instalments which had become due; that it was not to be considered as a payment rateably upon the whole amount of the debt, but that it was incumbent upon Dr Balmanno to apply the amount of the dividend in extinction of the instalment which had become due; because it was said, that upon the principles of the common law, according to the law of Scotland, that which a man had received, in the way in which Dr Balmanno had received this sum of money, in part payment of the debt, was to be applied in extinction of the instalment which had become due, and not to be considered as extending itself rateably over the whole amount of the debt.

My Lords, the Court of Session have been unanimously of opinion that the law ought to be considered as Mr M'Nee has construed it, namely, that Dr Balmanno was bound to apply his money in extinction of the instalments as they became due. On the other hand, it was contended, that looking at the sequestration, the payment must be considered not as an extinction of the instalments as they became due, but an extinction of so much in the pound upon the debt, and cases have been put in this House, and have been put in the Court below, which applied to that view of the case. Suppose, my Lords, there had been different sureties on those different instalments, the obligation on the part of the principal being to pay £450 at the end of each of four successive years; that there had been a distinct surety *A* to the first, a distinct surety *B* to the second, a distinct surety *C* to the third, and a distinct surety *D* to the fourth. Under the sequestration law, Dr Balmanno was entitled to come in, and was bound to come in as for a debitum de presenti, receiving a dividend upon the whole of that debt, namely, £1800. But if he received five shillings in the pound, by way of composition, (which would amount to £450,) if he were bound to apply that in extinction of the first instalment, the effect of that would be that the surety for the first instalment would be entirely exonerated, and the sureties for the other instalments would remain liable for the whole of the debt. I apprehend, my Lords, that was not the intention. The law is, that when a creditor comes in under the sequestration, he is entitled to receive a dividend upon the whole of his debt. What is the dividend? It is 10s. in the pound upon the whole of his debt. Then what he has received is 10s. of each pound which he has proved, by which receipt he has reduced his debt from £1800 to £900. But if he had been paid 19s. in the pound, the argument of the respondent would be, that the surety for the last instalment would be liable for that instalment; whereas, by the effect of the dividend paid, three of the instalments, as well as four-fifths of the other instalment, had been discharged. Feb. 24, 1826.

My Lords, an English case has been cited at your Lordships' bar. With respect to English cases, though the principle on which they are decided very often applies to Scotch cases, we must be extremely cautious, in deciding Scotch cases, not to be led aside by the effect of English cases. However, my Lords, an English case may be referred to in a case like the present, because the law upon the subject is very much the same in the two countries. That case occurred in the Court of King's Bench, where a question arose as against a surety, and where the same argument was used, as has been used here on the part of the respondent, namely, that the creditor ought to apply the dividend he had received in extinction of the instalments as they became due, and not rateably over the whole amount of the debt. That case was decided while Lord Ellenborough presided in the King's Bench, and the Court were clearly of opinion that was an incorrect view of the case, and that the money was to go, so far as it went, in extinction of the whole debt.

My Lords, the argument has turned upon the principles of the law of Scotland as applicable to this case; for no case has been cited before your

Feb. 24, 1826. Lordships, nor was any one cited in the Court below, in which this question has before occurred. The Court below seem to have proceeded on general principles, conceiving, and I apprehend conceiving rightly, that in trying a common law action the principles of common law were to be applied. They seem to have thought, however, looking at the Sequestration Act, that it had no effect upon the common law question. But it appears to me that the question must be decided with reference to the operation of the Sequestration Act; for if that has the effect of extinguishing so much of the whole debt, by applying the 10s. in the pound of the amount of the whole debt, the Court, when they came, in the proceedings at the instance of Dr Balmanno, to consider whether the instalment had been paid or not, were bound to see in what manner he had received the dividend, and how far it was applied under the Sequestration Act. I must confess, if the question is to turn upon the construction of the Sequestration Law in Scotland as affording the rule in this case, that with all the respect which we are bound to feel, and which no one feels more than myself, for the decisions of the Court of Session, and particularly when we have the unanimous decision of one Division of that Court, and, as it has been stated at your Lordships' bar, with the concurrence of several of the learned judges of the other Division, I feel it, my Lords, due to a decision so pronounced, at least to take a little time for further consideration before I advise your Lordships to reverse these interlocutors. If I were to act upon my present impression, I must confess to your Lordships, considering the general question in the cause, I entertain the strongest opinion against the decision of the Court of Session.

But then it has been urged, particularly by one of the learned counsel for the respondent, that even considering the principle upon which the Court of Session has decided to be wrong, still by a minute examination of these accounts, it will appear that the decision of the Court of Session, although not to be supported on the principles, on which it was supposed to be decided, ought to be supported by your Lordships on the facts of the case. My Lords, with respect to some of the reasonings of the counsel for the respondent, as to the sum paid by Mr Wilson, one of the sureties, and Mr John M'Nee, another of the sureties, it appears to me, on a cursory perusal of the suspension of the respondent himself, that he treats these payments as payments not made in respect of the instalments which had then become due, but as a sum paid, five shillings in the pound I think by one, and two shillings and sixpence by another, upon the whole of the debt, in which case again, according to the very act of the parties, the payment which had been made was not a payment which could, as between the sureties and the principal, be applied in extinction of the particular instalment which had become due, but must be considered as a payment, in respect of the whole debt; and in consequence of that payment those sureties were discharged from any further liability in respect of the future instalments, which might become due. If the payment was made in that manner, as I apprehend it is stated by the suspender (the present respondent) himself, I conceive that this payment must be ap-

plied not in extinction of the instalments that had actually become due, but rateably in extinction of the whole debt. Feb. 24, 1826.

My Lords, there are some other observations which I think it is due to the respondent's counsel to consider further before I proceed to advise your Lordships upon this part of the case; and having made these observations I shall move the adjournment of this case till next Friday morning, and if I find on consideration, that I have in any degree mistaken the general principles of law on which this case was intended mainly to be discussed, I shall state that to your Lordships; or if I find on the investigation that there is any weight or force in the observations made with respect to the mode of accounting between these parties, more particularly as applied (for I think they more particularly apply) to the second suspension, I will, having availed myself of the opportunity between this and Friday morning, of further considering the observations made by counsel, take the liberty of calling your Lordships' attention to these circumstances.

I now move your Lordships that this case stand for further consideration on Friday morning.

Ordered accordingly.

Lord Gifford.—My Lords, there are two cases in which Dr John Balmanno is appellant and Duncan M'Nee is the respondent; and at the conclusion of the argument on Tuesday last, I took the liberty of stating to your Lordships, what my impression then was; and that impression not concurring with the judgment of the Court of Session, and which judgment has been appealed against, I thought it right, out of respect to that decision, and the importance of the result of those cases, to the parties themselves, to ask your Lordships' indulgence, that the final decision might stand over until this day, that I might have an opportunity of duly considering the opinion which I had then formed, and of again looking through the papers, to see that the facts had been correctly impressed upon my mind. My Lords, upon due consideration I still remain of the same opinion which I then took the liberty of expressing.

My Lords, the question at law in this case arose out of the following facts. Dr Balmanno, the appellant, who it seems was a physician, was also the proprietor of a considerable business at Glasgow as a druggist. It appears that he disposed of this business to the respondent, Duncan M'Nee, for the sum of £1800. My Lords, Mr M'Nee, not being able to pay down that sum to Dr Balmanno, entered into a bond as a security to Dr Balmanno with two sureties, dated October 8th, 1820, and by that bond he secured to Dr Balmanno this sum of £1800 by four instalments of £450 each; the first to be paid on the first of July 1821, and the remaining three instalments on the first of July in each of the following years, with interest upon the principal sum from the first of July 1820, until the several instalments were paid.

My Lords, after the respondent had entered into this bond he fell into embarrassments, and finally a sequestration issued against his estate. I should state to your Lordships, that by the Law of Scotland a party, who

Feb. 24, 1824. is a creditor, though he comes in under a sequestration against the debtor, may at the same time adopt against that debtor common law proceedings. In that respect the law of Scotland differs from the law of England, and certainly it may be a question whether it would not be beneficial that the laws of the two countries should be assimilated in that respect; but whatever hardship this state of the law may operate, your Lordships are to decide according to the principles of the law as it at present exists. It has been contended that this is a hard and an oppressive case upon the respondent M'Nee; but this case, my Lords, is not to be decided upon the principles of hardship, but according to the principles of law.

My Lords, by one of the clauses in the Sequestration Act, if a creditor has a claim upon the debtor, which falls due at a future time, he is allowed to come in under the sequestration as for a present debt. Under this statute, Dr Balmanno ranked as a creditor for the full amount of his debt, namely, £1800. He also, as I have stated to your Lordships, proceeded at common law against Mr Duncan M'Nee. After that procedure, the appellant received under the sequestration a dividend of ten shillings and two pence, I think, in the pound. The dividend was paid upon the whole demand, namely £1800. That dividend in amount more than exceeded the first instalment, namely the first payment of £450. It was afterwards contended in the course of these proceedings in the Court of Session, that inasmuch as Dr Balmanno had through the medium of the sequestration received a sum of money more than equivalent to the first instalment, he was bound to apply it in liquidation of the instalment altogether, and consequently that Mr M'Nee ought to be free from the common law proceedings. On the other hand, it was contended by Dr Balmanno that though it were true that he had received more than the first instalment, yet it ought not to go in total liquidation of that instalment in the first instance; for your Lordships perceive that that dividend was a dividend upon the whole demand. In simple language he had received 10s. 2d. in the pound upon the whole of this £1800. The appellant contended that all that M'Nee had liquidated under the commission of sequestration, was, in fact, a dividend to be applied proportionally to the first instalment, and that the remaining part of the dividend was to be applied in liquidation of the other instalments, and presented the case in this way:—Supposing, that instead of there being two sureties for the whole amount of the money due upon the different instalments, A had been security for the first, B for the second, C for the third, and D for the fourth. Was it to be contended on the part of the surety A, who had been surety for the first £450, if Dr Balmanno had sued him for the difference between the first and second instalment, that he was to be free from the whole of the first instalment, and throw the onus of paying the future instalment on the subsequent sureties? It appears to me, my Lords, impossible so to contend. Surety C would have said, that the first instalment had not been paid. It is true that the creditor has received a sum of money greater than that to which the first instalment amounted, but he has received it not in respect of the first instalment only, but in respect of the whole demand—therefore the

first security is only discharged pro tanto, that is, to the extent which that dividend of 10s. 2d. in the pound would liquidate, and not for the remainder. Feb. 24, 1826.

It appears to me, my Lords, that that argument is quite unanswerable. It must be admitted, that if this payment be a discharge against the principal, it must be against the surety. A similar question occurred in this country; and although no decision under the Law of England can apply to, or govern, a decision under the Law of Scotland, yet in principle the two cases appear to be the same. That case (Martin *v.* Brecknell) is to be found in 2 Maule and Selwyn's Reports, p. 39, where a creditor sued a surety for a first instalment under similar circumstances to the present. It was not for the first, but for the third or fourth; but that makes no difference in the argument. The surety said, 'You proved the debt against 'the principal de præsenti, and the dividend you have received is more 'than sufficient to discharge that instalment, how can you sue me for 'that?' The answer by the creditor was, 'It is true I have received 'that sum of money, which in amount is more than the instalment that is 'due; but that sum of money is composed of a dividend of 10s. in the 'pound, upon *every* pound of my demand;' and it was admitted in that case, that there were no decisions under the Law of England which would apply to that state of facts. It was argued upon principle, that where a sum of money was paid generally, though it was larger than the first instalment, yet it was to be taken as a payment of so much only upon every pound of the sum due, as it would amount to; and therefore, that it only discharged that portion of the debt to which it was applicable. In this case it must be decided upon principle; and in that way the decision in the case to which I have referred equally applies to this, for there is no case in the Law of Scotland to govern that which is now under your Lordships' consideration.

The Court of Session say this is a proceeding at common law; and whatever might be the result under a sequestration, sitting here in a Court of common law, as this is a payment greater than the first instalment, we must apply it according to common law principles. But I think they were bound to see under what circumstances it was paid. It was a payment made under the Bankrupt Statute, and clearly in respect of the whole debt of £1800; so that in fact it was, if I may use the expression, a statutable payment, and was a payment of so much in the pound upon the whole sum of £1800, and not a definite payment of a particular part, as they considered it, and which was bound to be applied to the first instalment. I confess that the impression of the principle which I conceived, on Tuesday, ought to govern the case, has been confirmed by reading the papers, and I think that the Court of Session have erred upon a general principle of law.

My Lords, after this sequestration, it appears that the sureties themselves fell into difficulties, and a composition was agreed to by Dr Balmanno, in consequence of which he received a dividend of 5s. 6½d. in the pound from one of them, and 2s. 6d. from the other. It appears that

Feb. 24, 1826. there was a second proceeding—a second detainer lodged against the respondent Duncan M'Nee, for the balance of a subsequent instalment. A bill of suspension was then presented to stay proceedings against him for the future instalments—upon the same principle, that the dividend which Dr Balmanno had received under the commission, and the sums he had received from the sureties, would more than equal the amount of the instalment then due; and that they ought not to be applied to the future instalments, but to be applied to the past. Now, he states in the bill of suspension, 'that it is admitted under the hand of Dr Balmanno and his 'agent, that on the 17th May 1823, a dividend of 10s. 2½d. had been re-'ceived from the suspender's estate upon the accumulated principal and 'interest; 5s. 6d. from M'Nee, the cautioner (that being 5s. 6d. in the 'pound upon the whole debt); and from another cautioner, John Wilson, '2s. 6d. upon the debt; but the complainer was not set at liberty.' In that very bill he states that the appellant had only received 10s. 2d. *in the pound.* The cases coming on together, the Judges of the Court of Session were of the same opinion in this case as they were in the former—that the appellant was obliged to apply the dividends received in discharge of the past instalments, though, I confess, it appears to me, upon looking at the agreement between the principal and the sureties, and all that had taken place, it was a dividend of so much in the pound upon each instalment.

My Lords, it was supposed that there was a wrong computation, which does not appear to me to have taken place in this case at all. It appears to me that there was a sum of money due to Dr Balmanno upon the first proceeding as well as the second; and, therefore, I am under the necessity of proposing to your Lordships that the judgment pronounced by the Court of Session be reversed. I apprehend your Lordships' judgment would be, to reverse the interlocutors, and repel the reasons of suspension. Much as I may regret taking a different view of this case to that which has been taken of it by the Court of Session, I do state, after a very anxious consideration of the case, that I have no difficulty in saying that the principle on which they have decided is erroneous; therefore I must move your Lordships that these interlocutors be reversed.*

FRASER, Solicitors.

---

* A separate report of the other case alluded to has been considered unnecessary.

ALEXANDER EWING, BUCHANAN & Co., and MALCOLM, Appellants.—*Shadwell—Robertson.*
WILLIAM LAWRIE, Respondent.—*Keay—Jas. Campbell.*

No. 3.

Bankrupt—Trustee.—Held (affirming the judgment of the Second Division), in a petition and complaint by creditors against a trustee on a sequestrated estate, praying for his removal,—that although he had committed some irregularities, yet they were not such as to warrant his removal, and as the other accusations against him were not well founded, he was entitled to his expenses, subject to modification.

Feb. 28, 1826.
2D DIVISION.

HUGH GILCHRIST, merchant in Glasgow, having become bankrupt, his estate and effects were sequestrated, and William Lawrie appointed trustee. After certain proceedings had taken place under the sequestration, and after the lapse of three years, Ewing, Buchanan and Co., and Malcolm, creditors of Gilchrist, presented a petition and complaint to the Court of Session against Lawrie, praying 'to ordain him to account for his intromissions 'and management, and to answer for his conduct generally; 'and thereafter to find that the said William Lawrie has con- 'travened the provisions of the statute, and has otherwise mis- 'conducted himself in the management of the estate, and the 'affairs of the sequestration; and in case it shall appear, in the 'course of the investigation to follow hereon, that the said trus- 'tee has been guilty of such misconduct as to warrant his remo- 'val, to remove him accordingly from his office of trustee, and 'to appoint the creditors of the said Hugh Gilchrist to meet at 'such time and place as your Lordships shall appoint, to elect 'another trustee in his room; or otherwise to inflict such cen- 'sure upon the said William Lawrie, as his conduct shall appear 'to merit; and to ordain him to take such steps for the interests 'of the creditors, and for the due management of the estate, as 'the statute requires.' In support of this prayer they made various accusations against Lawrie, and particularly that he had not regularly transmitted a copy of the Sederunt-book to the Clerk of Court; nor framed and exhibited periodical states of the bankrupt's affairs; that he was a confident of the bankrupt; had got himself appointed trustee, merely with the view of carrying through a discharge; and that he had given to the bankrupt pecuniary allowances, without the sanction of the creditors.

Lawrie denied the charge of misconduct and mismanagement, and stated that he had regularly kept a Sederunt-book; and although a copy had not been regularly lodged in process, no injury had been thereby suffered; that there were scarcely

Feb. 28, 1826. any personal funds, so that periodical states were unnecessary, and would merely have created expense to the creditors; that the bankrupt had been employed by their sanction to act as superintendant of the heritable property, and had received a recompense for his labour; and that the objections to the election of Lawrie as trustee were unfounded, and at all events were not competent, seeing that he had been duly confirmed, and had acted for upwards of three years; and there was no prayer for removal in respect of original disqualification.

The Court found, 'that although there were certain irregularities committed by the trustee, yet these were not such as to 'warrant his removal, therefore dismiss the complaint and decern: Find expenses due, subject to modification, and remit to 'the auditor to report on the account thereof when lodged.' And on advising a reclaiming petition and answers, they adhered.*

In relation to the objections mainly founded on by Ewing, their Lordships held, that if any allowance had been made to the bankrupt without authority, the only consequence would be, that Lawrie would not be allowed credit for it in his account; that, under the peculiar circumstances of this case, the neglect to frame periodical states of the affairs, and to lodge a copy of the Sederunt-book, was not such an irregularity as to infer a forfeiture of office; and that the objection as to Lawrie being a confident of the bankrupt, was only competent prior to his confirmation as trustee.

Ewing having appealed, the House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

Lord Gifford.—My Lords, the appellants in this case appeal from certain interlocutors pronounced by the Second Division of the Court of Session.—It appears that the respondent, Mr Lawrie, was appointed trustee on the sequestrated estate of Mr Hugh Gilchrist. The appellants, who were creditors of Gilchrist, presented to the Court of Session a petition and complaint, alleging that Mr Lawrie had contravened the provisions of the statute, and been guilty of misconduct, for which he ought to be removed from his situation of trustee. When this petition came on to be heard before the Court of Session, they pronounced this interlocutor:—'The Lords having advised this petition and complaint, with answers 'thereto, replies and duplies, find, that although there were certain irregularities committed by the trustee, yet these were not such as to warrant his removal: Therefore dismiss the complaint, assoilzie the respon-

* See 3 Shaw and Dunlop, No. 178.

'dent, and decern: Find expenses due, subject to modification, and remit Feb. 28, 1826.
'to the auditor to report on the account thereof when lodged.'—Against this interlocutor there was a reclaiming petition, and upon that petition coming on to be heard, they affirmed the interlocutor reclaimed against, and refused the prayer of the petition. From these judgments an appeal has been brought to your Lordships.

My Lords, I must confess, considering the nature of this proceeding, that it appears to me that appeals of this nature do not deserve much encouragement; because, when a complaint of this sort is made against a person in the situation of trustee on a sequestrated estate, on whom an onerous duty is cast, it does appear to me, that charges brought against the trustee ought to be fully substantiated. In this case, it was conceded at your Lordships' bar, that many of those complaints which have been preferred against the trustee, were clearly of such a nature, that the Court could not do otherwise than consider that they ought not to have been preferred; and of others, that they were not substantiated. At the same time, it must be admitted, that, looking to this complaint, the Court of Session were of opinion, that, in some respects, the trustee had been guilty of irregularity.

My Lords, by the Act of Parliament in question, it is enacted, that the interim factor, Sheriff Clerk, and the trustee, and commissioners, or any of them, shall at all times be amenable to the Court of Session, by summary application to that Court, to account for their intromissions and management, and to answer for their conduct, at the instance of any party interested; and in case it shall appear to the Court that such application ought not to have been made, the party complained of shall be entitled to his full costs, to be either retained out of the funds, or recovered from the party complaining, as the Court shall direct; but otherwise, the Court shall give such directions, in regard to costs, as they shall think fit. It then goes on to enact, that 'it shall be lawful for one-fourth of the creditors 'to apply summarily to the Court of Session, for having the said interim 'factor or trustee removed, upon cause shown.'

My Lords, by this petition the individual creditors, the appellants, seek to have the trustee removed; and then, in the alternative, if the Court shall not think fit to remove, seek for a censure by the Court of Session, such as they shall conceive appropriate to the merits of the case. It is said, that though the Act of Parliament enacts, that it shall be competent for *one-fourth* of the creditors, yet that, nevertheless, it is competent to every individual creditor to apply. If that be the case, it appears to me that this part of the Act of Parliament is so far wholly useless. However, without further adverting to that part of the case, the simple question before your Lordships is, in the first place,—Is this interlocutor well founded,—it finding that there were certain irregularities, but that they were not such as to warrant the trustee's removal? I apprehend no fault can attach to the interlocutor in that respect. It appears to me, that the major part of the complaint against the trustee was either irrelevant or not proved; that there were certain irregularities, is also clear. Then

Feb. 28, 1826. comes this question, that part of the interlocutor being right,—Have the Court exercised a sound discretion with respect to the costs? My Lords, when I first read this interlocutor, without attending to those words, to which I first called your Lordships' attention, it struck me as a little singular, that, if the Court found the trustee guilty of any irregularity, they should give him the whole costs of the proceedings in Court; but that is not the effect of the interlocutor—it finds expenses due, 'subject to modi-'fication,'—that is to say, that they do not give the whole expense against the petitioner, but thinking, as they do, that a great part of this complaint ought never to have been made, as casting unfounded calumnies upon this respondent, they say, that as to that part of the complaint he ought to have his costs; and I must confess, I agree with the Court of Session in that view of the case. If the Court of Session had found the petitioner liable to all expenses of this proceeding, the judgment might have been charged with the inconsistency charged upon it, at your Lordships' bar; but it only finds the petitioner liable to expenses, subject to modification—that is, it finds him liable, when the report of the auditor comes back, for the costs of that part of the proceeding, in which the Court think he has completely failed, and which ought, therefore, never to have been insisted in by him.

My Lords, in this view of the case, I feel it my duty to move your Lordships, that these interlocutors be affirmed; and thinking as I do, though I would not prevent a fair creditor bringing forward a fair complaint against a trustee, and, on the contrary, holding that the door ought to be open to him, but thinking that many of the complaints in this petition are unfounded, it does appear to me that this appeal to your Lordships, which is not so much an appeal on the merits of the interlocutor, as against that part fixing the appellant with costs, is an appeal which ought not to be encouraged; and I shall therefore move your Lordships, that this interlocutor be affirmed, with costs.

J. GREGGSON and J. RICHARDSON, Solicitors.

No. 4. ALEXANDER EWING, Appellant.—*Shadwell—Robertson.* HUGH GILCHRIST, Respondent.—*Keay—Jas. Campbell.*

Bankrupt—Discharge.—Judgment, affirming that of the Second Division, discharging a bankrupt under the Act 54 Geo. III. c. 137, and repelling various objections to the discharge being granted.

Feb. 28, 1826. 2D DIVISION. HUGH GILCHRIST, merchant in Glasgow, having become insolvent, his estate and effects were sequestrated on the 21st July 1820, under the statute 54 Geo. III. c. 137. Thereafter, having obtained the statutory concurrence, he presented a

petition, on the 19th January 1822, to the Court of Session, praying for his discharge. Alexander Ewing, a creditor, objected inter alia, that the sequestration had been resorted to by the bankrupt and the trustee as a mere pretext, to procure for the former a discharge of his debts; that the concurrence of many of the creditors was gained by illegal and unjustifiable means; that this concurrence was given before they had claimed or were ranked on the estate; and that the amount of his claim, which had not been computed, was sufficient to turn the balance, and exclude the application. Gilchrist, in answer, denied the truth or relevancy of these charges, and contended, that it was competent for the creditors to concur prior to being ranked; and that as one of the non-acceding creditors had now acceded, there was a majority in his favour. The Court, on the 24th May 1823, appointed the trustee to give in a new report, 'showing the proportion, both in number and value, on which 'the creditors, who have produced grounds of debt and oaths of 'verity at this date, concur in the application.' The trustee having reported, that, including the creditor who formerly did not accede, but who now did, there was a majority, the Court found 'the bankrupt entitled to be finally discharged of all his debts 'contracted prior to the application to sequestrate his estate.' And on the 8th July, having resumed consideration of the petition for discharge, and the petitioner's oath in terms of the statute, 'found him finally discharged of all his debts con-'tracted before the 21st July 1820;' and decerned and declared accordingly. Ewing petitioned, and the petition being followed with answers, the Court unanimously adhered, and found the petitioner liable in the expenses of the answers.* Ewing appealed from these judgments, on the grounds on which he had relied in the Court of Session. The respondent, in addition to his former statement and argument, maintained that the appellant had allowed the judgment of the 8th July to become final, and could not be heard against the previous one; that even if the point were open, he had relinquished his old pleas, and betaken himself to new grounds equally untenable; and that appeals against discharges are to be viewed with great unwillingness and jealousy.

Feb. 28, 1826.

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutor complained of be affirmed, with £150 costs.

* See 2 Shaw and Dunlop's Cases, No. 716.

Feb. 28, 1826. *Lord Gifford.*—My Lords, this case of Ewing *v.* Gilchrist arises out of the last case of Ewing *v.* Lawrie. It is, I think, a case of great importance.—Mr Gilchrist, who had carried on business as a merchant in Glasgow, having become embarrassed in his circumstances, his estates and effects were sequestrated: Mr Lawrie was appointed trustee, and Mr Gilchrist obtained his discharge from a competent number of creditors having concurred; but Mr Ewing, the present appellant, chose to apply to the Court of Session to recall that discharge, alleging various complaints. The Court of Session, however, found Mr Gilchrist entitled to be finally discharged of all his debts, and found the petitioner liable in the expense of the answers to his petition. An appeal has now been brought to your Lordships' house against these judgments.

My Lords, I apprehend such an appeal is certainly competent; but I fully concur in an observation made by the noble and learned Lord who usually presides in your Lordships' house, that an appeal of this description, although competent to your Lordships to entertain, is one that ought to be looked at with great caution by your Lordships. The bankrupt had obtained his discharge with the concurrence of a competent number —that discharge was complained of before the Court of Session, on the ground of misconduct on the part of the bankrupt—not only misconduct in his bankruptcy, but misconduct in obtaining improperly the concurrence of his creditors; and another charge was made, which I apprehend it to be incompetent for this gentleman to make, namely, as to the manner in which the sequestration had issued; because if it had improperly issued, there was a remedy in recalling that sequestration. He also complained of the manner in which the creditors had been permitted to rank on the estate, alleging that the bankrupt was not entitled to ask any creditor to sign his discharge, if that creditor had been improperly permitted to rank by the trustee; though, with respect to ranking, it was competent for any creditor to have brought that before the Court of Session.

The Judges of the Court of Session minutely investigated the case, and were of opinion that there was no ground whatever to impeach the discharge of the bankrupt, and therefore refused to recall that discharge.—Against that decision, an appeal was brought to your Lordships' house by Mr Ewing. My Lords, although I say an appeal be competent to your Lordships, yet, considering the situation of a bankrupt, who has thus obtained his discharge, and whose case has been thus investigated by the Court of Session, your Lordships would expect to have it most clearly made out, that the Court of Session have decided wrong in allowing that discharge, before you would think of setting aside such a decision of the Court of Session.

My Lords, after attending to the argument at your Lordships' bar, and the statement made in these papers, it does not appear to me that any case has been made out, to my satisfaction at least, and I should conceive not to your Lordships', to disturb the decision of the Court of Session 'allowing this bankrupt's discharge.' That being so, I apprehend your Lordships will feel no difficulty whatever in affirming the interlocutors complained of. If your Lordships do affirm the interlocutors upon such a

ground, then I apprehend, that viewing the respondent in the situation of a bankrupt who has properly surrendered up all his property to his creditors, who, it appears by the decision of the Court of Session, has, in the opinion of the majority of his creditors, acted honestly under the sequestration; and considering that this petition complained of the discharge of a bankrupt under such circumstances, your Lordships, if the appeal appear to be unfounded, will take care, that a bankrupt who has been thus dragged before your Lordships' house, shall be fully indemnified against the expenses which he has incurred in being brought here to support the decision of the Court of Session. My Lords, in this case, therefore, I shall submit to your Lordships, not only that these interlocutors be affirmed, but that your Lordships will take care, that that shall be accompanied with such an addition as shall indemnify the bankrupt against the costs he has incurred in supporting his discharge, which he properly obtained, and which has been sanctioned by the Court of Session, after a minute investigation of his case. In this case, therefore, I shall take the liberty of moving, that these interlocutors be affirmed, and that they shall be affirmed with such costs as shall indemnify the bankrupt in coming before your Lordships to support the decision of the Court of Session in his favour. Feb. 28, 1826.

J. GREGGSON and J. RICHARDSON, Solicitors.

CAMPBELL, RIVERS, and COMPANY, and Others, Appellants.— *Adam—Kaye.*
DAVID BEATH, Respondent.—*Sol.-Gen.* (*Wetherell*)—*Keay.* No. 5.

Recompense—Partnership—Mutual Contract.—Circumstances under which it was held (reversing the judgment of the Court of Session) that a partner in a joint adventure, the terms of which were arranged by a written contract, had no right to recompense for personal trouble connected with the adventure, for which no stipulation had been made, but which it was alleged was casus improvisus; nor to indemnity for the adventure having been put an end to as ruinous.

CAMPBELL, Rivers, and Company, Thomson, Wright, and Company, and David Beath, engaged in a joint mercantile adventure to India, in terms of the following contract:— Mar. 3, 1826. 1ST DIVISION. Lord Alloway.

'1st, That the adventure by the ship Prince Regent, in 'addition to the vessel purchased for £5250, and the scheme 'of goods furnished by Mr Beath, shall consist of £10,000— '£12,000 sterling in dollars to be purchased and shipped at 'Gibraltar.

'2d, That of this adventure one half shall be assigned to 'Campbell Rivers and Company, one fourth to Thompson 'Wright and Company, one fourth to Mr Beath; in which pro-

Mar. 3, 1826. 'portion each party shall receive gain or suffer loss; and what-
'ever part of the funds required for Mr Beath's interest, that
'may be deficient, shall be advanced equally by Campbell Ri-
'vers and Company, and Thompson Wright and Company.

'3d, That, in the event of the prospects appearing to him
'favourable, Mr Beath is authorized to remain at Madras, after
'dispatching the Waterloo and Prince Regent, with the view of
'forming a mercantile establishment at that place; the respec-
'tive parties in this country engaging to declare their intentions
'in this regard within one month after the arrival of the ship
'Prince Regent, or receipt of advices from Mr Beath, up to the
period of the sailing of that vessel: And the following outline
'of an agreement for said establishment was agreed to, subject
'to such changes as may be mutually agreed on at a future
'period:—

'1st, That a fixed capital of £60,000 sterling shall be ad-
'vanced, to continue during the term of the arrangement, which
'at present is not understood to extend beyond 31st December
'1821, interest on the stock being drawn annually, but no part
'of the profits till the expiry of the agreement. That a separate
'firm, to be afterwards settled, (and to be placed under the
'management in Liverpool of a partner from each of the com-
'panies of Campbell Rivers and Company, and Thompson
'Wright and Company,) shall be assumed, and the interest of
'the parties to be fixed as follows:—To Campbell Rivers and
'Company, three eighth parts; Thompson Wright and Com-
'pany, three eighth parts; David Beath, two eighth parts ditto;
'in which proportion each party advance their share of the
'above-named capital; it being understood that whatever amount
'Mr Beath may be deficient, is to be equally advanced by Camp-
'bell Rivers and Company, and Thompson Wright and Com-
'pany.

'2d, That Mr Beath will have the management of the com-
'pany's affairs in India, with either his store rent, clerks' sala-
'ries, and household expenses, allowed him, or a fixed sum in
'lieu of the latter, as may be hereafter determined. That such
'household furniture as may be considered necessary shall be
'purchased and shipped by the Prince Regent, which furniture
'will remain the property of the company, should Mr Beath's
'permanent residence be determined on, or otherwise to be
'considered a part of the adventure by the ship, and sold ac-
'cordingly.

'3d, That should Mr Beath remain in India after the de-
'parture of the Waterloo and Prince Regent, and the other

'parties in this country not concur in the propriety of prose- Mar. 3, 1826.
'cuting the business in the manner provided for in the prece-
'ding resolutions, then a sum, to be mutually agreed on, shall
'be paid to Mr Beath, as a remuneration for his loss of time
'waiting such decision from this country, in addition to his
'necessary expenditure and passage home. The foregoing to
'be equally binding as if extended in regular contract. Copies
'of this agreement exchanged at Glasgow, 25th September
'1818. (Signed) CAMPBELL RIVERS and Co. Pro Thompson,
'Wright and Co., A. GORDON. DAVID BEATH.'

In prosecution of this joint adventure, Mr Beath and family proceeded to Madras in the ship Prince Regent, containing part of the goods of the joint adventure. He found that place not so eligible for the establishment as had been anticipated; and therefore, leaving his family at Madras, he went on to Calcutta, from which, on 27th June 1819, he wrote to Campbell Rivers and Company.—'I have stated my opinion of my establishment 'being here rather than in Madras, and the more I see of this 'place (Calcutta), the more I am confirmed in my opinion. The 'resources of Madras are nothing in comparison to this, and but 'one or two ships loaded annually, and the only object in view 'was cotton, which had, before the bad accounts came out, been 'so much run upon by every merchant in the place, that it was 'run up to 45 pagodas per candy, and even sending agents into 'the country where it was grown to engross all they could. 'And the consumpt for goods is equally comparatively small to 'this; and I never could expect to do much commission business. 'Ships only call there on their way to this, to try the market 'with their outward investments; and every object, I think, 'could be obtained by Mr Maitland remaining there, otherwise 'paying a commission to Binny and Co.; whereas my establish-'ment here, with interest used on your parts at Clyde, London, 'and Liverpool, I might do something very handsome.'* And the letter concludes with a scheme of goods suited for Calcutta.

In the meantime, Mr Beath had not sailed many months, before Campbell Rivers and Company received information, which made them dread that the perseverance in the joint adventure would prove disastrous. They, therefore, on the 2d February 1819, and while he was on the outward voyage, wrote

* The respondent contended, that the letter proceeded to show that he was about to return to Madras, to remain for advices on the subject from Europe; but this evidence was objected to, and the objection sustained, as not having been read in the Court below.

Mar. 3, 1826. to Mr Beath as follows :—'Since you left us, the aspect of commercial affairs has become very gloomy. A general scarcity of money has prevailed, and is daily increasing; the effect has been a decline in almost every description of produce, but particularly cotton, which has fallen more in proportion; and as the stock remaining over from last year is unusually great, the crop in America better than an average, and the importation from India rapidly increasing, improvement in price cannot possibly be expected. On the contrary, we must look forward to cottons being lower than for many years back. Under these circumstances, we are most anxious for the result of the several adventures to India; and trust that advices from hence would reach Mr Maitland in time to prevent any considerable purchases of cotton for the Waterloo, inducing him to prefer investing in price goods at moderate prices, which, though considerably lower than when he left this, would still pay better than anything else from Madras. We also hope that you have succeeded in your views respecting coffee at Ceylon, which, and your purchasing piece goods and such other articles as were pointed out to you, is our only chance of getting off without loss. In this situation of affairs, we are decidedly of opinion that any permanent arrangement for an establishment in India would at present be imprudent; and we therefore wish you to arrange matters so as to return to this country in the ship Prince Regent, when, with your more mature opinion on affairs at Madras, and an improved state of matters here, we may be able to concert between us for prosecuting business in India. This measure we consider preferable to your remaining at Madras at a considerable expense, and much loss of time. Should this not reach you in sufficient time to enable you to return in the Prince Regent, (which in every view would be desirable,) it will remain with yourself to adopt the most prompt measures for bringing your concerns to a close, and come home by an early conveyance. We would, of course, prefer your having the whole of the adventures settled previous to your departure; but, in the event of that not being practicable, we recommend you placing whatever may be left behind in the hands of Messrs Binny and Company, with instructions to invest the proceeds in good bills, and remit the same in the proportions in which we are interested.'

Upon receipt of this letter, Mr Beath dissolved the mercantile connexions he had made in India, and returned to Great Britain. The adventure was ruinous, the loss amounting to above £20,000, and was not further prosecuted.

Some time after, Mr Beath raised an action in the Court of Session against Campbell Rivers and Company, stating, that 'he is entitled to demand from the defenders a suitable recompense for his trouble and management in selecting, superintending, disposing of, and collecting the price of the foresaid 'cargo, which was sent from Britain to India on board the said 'vessel (the Prince Regent), and for his trouble and management 'in going to India, in order to ascertain and inform the defenders 'what would be the probable success of the proposed permanent 'mercantile establishment in India, and to form such an establishment in the event of its being ultimately agreed upon.' Also, that he is 'entitled to reparation of the loss and damage which 'he sustained in consequence of the defenders' having departed 'from the foresaid agreement, and thereby not only rendered 'useless the preparations he had made, at considerable expense, 'for the residence of himself and his family in India; but also deprived him of the opportunity, which he would otherwise have 'enjoyed, of employing his capital in the advantageous trade which 'could then have been carried on between this country and India.' And on these grounds the pursuer concluded for decree against the defenders for payment of '£1500, or of such other 'sum, more or less, as our said Lords shall be pleased to modify 'as a recompense to the pursuer for his foresaid trouble and 'management on behalf of the defenders in the premises; and 'also, of the sum of £2000, or such other sum, more or less, 'as our said Lords shall be pleased to modify, in name of 'damages, and reparation for the loss and injury which the pursuer has sustained in the premises.' Mar. 3, 1826.

Campbell Rivers and Company maintained in defence, that none of the partners were entitled to any sum in name of recompense for trouble or management. Each looked exclusively to his interest in the joint adventure for the ultimate reward of his exertions. If the pursuer superintended the business abroad, the defenders had their share of management at home. Besides, it was distinctly stipulated that the pursuer was only to have his 'store rent, clerks' salaries, and household expenses allowed him,' unless he remained in India after the departure of the vessel, which he did not do. Neither had the pursuer any claim of damages, because no mercantile establishment was formed. The business was contemplated to be carried on at Madras, but the pursuer admits that business could not have been profitably prosecuted there, and, in point of fact, formed no establishment there; and even as to an establishment there, the defenders had reserved, by the agreement, a

Mar. 3, 1826. right to concur or dissent. The pursuer was only entitled to his necessary expenses there, and a passage home, which he has received.

The Lord Ordinary found, 'That, from the nature of the 'agreement betwixt the parties, the pursuer was induced to go 'to India, having a certain share in the concern with the defend- 'ers, with the view of establishing a mercantile concern in In- 'dia—that it was provided by the agreement betwixt them, 'that, should the pursuer remain in India after the departure 'of the Waterloo and Prince Regent, and the other parties 'should not concur in the propriety of prosecuting the busi- 'ness, then a sum, to be mutually agreed upon, should be 'paid to the pursuer as a remuneration for his loss of time 'waiting such decision from this country, in addition to his 'necessary expenditure and passage home—that, within three 'months after the pursuer's departure from this country by 'the ship Prince Regent, his partners, discovering that the 'trade would be most ruinous, and by which it is said that 'the company have lost to the amount of £20,700 upon the 'cargoes of two ships, the Waterloo and the Prince Regent, 'they immediately wrote him, that they had abandoned their 'intention of a mercantile settlement in India, as, from the state 'of the markets, it would be most ruinous, and desiring him to 'come home by the Prince Regent, which he accordingly did; 'and therefore found, that by the clause in the agreement, as 'he did not remain in India after the departure of the Prince 'Regent, he could not have a claim under it for a remuneration 'for his loss of time. But found, that independent of that clause 'altogether, the pursuer has a claim for some indemnity for his 'having acted as supercargo on board these vessels, and for his 'loss of time for having embarked to India with the view of 'settling there, for the benefit of the common concern, which 'could never have been proposed to him without some in- 'demnification, if no ultimate settlement did take place in 'India, as, while the other parties were carrying on all the dif- 'ferent concerns in which they were engaged in this country, 'the pursuer, by his going out and coming home in the Prince 'Regent, was exclusively employed in that concern, and could 'be employed in no other; and therefore he stood in this respect 'in a different situation from the other parties concerned; and 'his return by the Prince Regent, by the orders of the defend- 'ers, without any settlement in India, for which purpose he had 'carried his wife and family there, being a case unforeseen and 'unprovided for in the contract, he is entitled to a fair indem-

'nification on that account from the concern in general: there- Mar. 3, 1826.
'fore, before farther answer, appointed the pursuer to give in a
'condescendence, in terms of the act of sederunt, stating the
'precise time he was abroad upon this concern, and the sum he
'claims on that account.'—To this judgment his Lordship adhered,—and on the defenders having petitioned the Inner-House, the Court (2d December 1824) refused the petition, without answers, and adhered to the interlocutor reclaimed against.*

Lord Balgray.—I should like to have an answer to the petition. There was here a joint adventure, the fate of which had been adverse, and all concerned behoved to suffer. I look only to the agreement between the parties, of 3d September 1818. I do not think there was any occasion for Mr Beath to have taken out his family.

Lord Hermand.—I see no occasion for an answer. It is clear that the interlocutor is right. There was obviously a casus improvisus, and the respondent is entitled to indemnity, of which neither the caprice of the petitioners, nor the adverse fate of the adventure, could deprive him. The respondent had given time and toil, while the other parties were managing their concerns snugly at home.

The Lord President.—I am equally clear that the interlocutor is well founded. A casus improvisus has occurred, and it is out of the question to say, that the petitioners could put an end to the adventure in the manner they have done, without a trial of the adventure; and refuse the respondent the fair indemnity to which the interlocutor has found him entitled.

Lord Gillies.—I quite agree with Lord Hermand and the Lord President. The respondent's right to an indemnity,—such indemnity as the interlocutor points at, is not excluded by the agreement. This was clearly a casus improvisus, and, moreover, the petitioners were bound to have given the adventure a fair trial. I differ from Lord Balgray, and see good reason for Mr Beath having taken out his family. Though other contingencies may have been unprovided for, that was contemplated by the agreement.

Campbell Rivers and Company appealed from these judgments.

---

* See 3 Shaw and Dunlop's Cases, No. 264.

Mar. 3, 1826.

Appellants.—The rights and claims of the respondent must be regulated solely by his written contract with the appellants, and the judgment below is therefore erroneous, as awarding indemnification in respect of this 'being a case unforeseen and 'unprovided for in the contract.'—The plea of casus improvisus does not in any proper sense apply to the present case. The contract contains materials amply sufficient for determining the matter at issue; there being analogous contingencies thereby provided for, which, by necessary and unavoidable inference, lead to the decision of the point in dispute. He would have had no claim if the Indian establishment had been made, and had succeeded. He would have had no claim if the establishment had been made, and had instantly failed, and been obliged to be given up. He would have had no claim, at least, beyond a mere remuneration for 'waiting, 'after dispatching the vessels on their homeward voyage, for de-'cision from this country.' If a difference of opinion had arisen as to the expediency of forming the establishment at Madras, and the appellants had objected, the respondent was only entitled to a remuneration for loss of time, waiting a decision from Great Britain. But he had not to wait. The contingency of events not appearing favourable, was kept in view in the contract—so is not a casus improvisus. And, looking to the ruinous consequences of persevering, the respondent ought (whether he had got instructions or not from the appellants) to have given up all thoughts of the establishment; and, in point of fact, he had ceased to think of settling at Madras—and Calcutta was not the place selected by the agreement. It is therefore incorrect to say, that the appellants had put an end to the establishment. Although the judgment of the Court of Session only finds a sum due, without fixing the amount, the appellants ought not to be forced to go before a Jury, with a finding against them on the law. The time and trouble expended by the respondent, was just part of the stock; and the appellants also contributed time and trouble.

Respondent.—The Court of Session decerns for indemnity to the respondent, for his services as supercargo, and preparatory to establishing in India the business contemplated by the agreement. The precise amount is to be the subject of future consideration. That the plan should have been departed from, by the appellants writing from Great Britain, instead of abiding receipt of letters from the respondent, was a casus improvisus, which none of the parties had in view, and against which the respondent is entitled to be protected by a suitable indemnity, in the same way as if the plans had been relinquished in conse-

quence of advices from himself. The ulterior object, in considering the propriety of prosecuting which, much of the time, labour, and expense of the respondent were expended, was defeated by the appellants themselves, which they had no right to do, at least until they had heard from the respondent. They had nothing to manage in this country, he had there the labour of the shipments; and the commencement of the undertaking in India was to depend on his letters. The respondent had the right of judging whether an establishment should be made or not. The correspondence, before the agreement, shows that an indemnity was contemplated. If he had set up his judgment against that of the appellants, and they had recalled him, he would have been entitled to remuneration under the agreement; and he cannot be deprived of that, because the appellants did not allow him an opportunity of giving a definite opinion. Mar. 3, 1826.

Lord Gifford.—You say it was the respondent's judgment that was to determine whether he was to form the establishment or not. But was it his judgment to form the establishment at Madras? In your summons you do not say that you had resolved to establish yourself there.

Solicitor-General.—The appellants put an end to the agreement; they did not give the respondent time to exercise his judgment. It is too monstrous to hold, that Mr Beath ever contemplated that these services were not to be remunerated.

Lord Gifford.—He had the chance of the contingent profits.

Solicitor-General.—Yes; but then it is clear, that he was also entitled to a consideration, ultra the profits of the partnership.

Lord Gifford.—If he had determined not to remain, and had returned by the vessel to this country, could he have claimed remuneration as supercargo?

Solicitor-General.—No; that would have been his own act. He himself would have been putting an end to the agreement. If there had been no agreement, we hold it clear, that, on the principles of copartnership, the respondent would have been entitled to remuneration, over and above his share of the profits for his extraordinary services.

Lord Gifford.—Whether he stipulated for it or not?

Keay.—We take the case of there having been no agreement at all; and we hold that he would. But he is also protected by the agreement, according to every fair interpretation. Is it possible that the profits on a one-fourth can be considered as an equivalent?

Mar. 3, 1826. *Lord Gifford.*—But can we make a new contract?

Keay.—Under the contract, the respondent went to India to establish a company there, if he approved. If he approves, then he is to get a remuneration on being summoned home. Could he have been compelled to go, had the present plea of the appellants been divulged? No doubt, he was subject to control; but it is not to be presumed, that he would have been recalled in the face of a favourable report. Therefore, we maintain that the appellants should have waited until the dispatches arrived, and then have made up their minds to prosecute the adventure or not. The establishment was *Indian*, was not necessarily to be fixed at Madras only, and his accounts favourable.

The House of Lords ordered and adjudged that the interlocutors complained of be reversed, and the appellants assoilzied.

Lord Gifford.—My Lords, if in this case I had entertained any serious doubts, I should have requested your Lordships' indulgence for a short time before I stated my opinion; but after paying all due attention to the arguments urged at your Lordships' bar, and also to the arguments contained in these papers, I freely own to your Lordships, that I have come to the conclusion that these interlocutors pronounced by the Court of Session cannot be supported.

My Lords, this action arises out of a contract entered into with the respondent and the appellants, Messrs Campbell Rivers and Company, and Messrs Thompson Wright and Company, in the year 1818; and by that contract it appears, that these three parties, Campbell Rivers and Company, and Thompson Wright and Company, and Mr Beath, entered into a partnership transaction, with respect to an adventure in property then about to be sent out to India, in two vessels called the Prince Regent and Waterloo; and by that contract it was resolved, 'That the adventure 'by the ship the Prince Regent, in addition to the vessel purchased for '£5250, and the scheme of goods furnished by Mr Beath, shall consist of '£10,000 and £12,000 sterling in dollars, to be purchased and shipped 'at Gibraltar: That of this adventure one half shall be assigned to Camp-'bell Rivers and Company, one fourth to Thompson Wright and Com-'pany, one fourth to Mr D. Beath; in which proportion each party shall 'receive gain or suffer loss; and whatever part of the funds required for 'Mr Beath's interest that may be deficient, shall be advanced equally 'by Campbell Rivers and Company, and Thompson Wright and Com-'pany.' Your Lordships perceive, in this adventure the parties were to be interested in different proportions, and the part of the fund which Mr Beath should not be able to contribute was to be made up by Campbell and Company, and Thompson and Company. My Lords, the agreement then goes on to provide for the establishment of a partnership concern in India, and by the third article it is provided, 'That in the event of the

'prospects appearing to him favourable, Mr Beath is authorised to remain 'at Madras, after dispatching the Waterloo and Prince Regent, with the 'view of forming a mercantile establishment at that place, the respective 'parties in this country engaging to declare their intentions in this regard 'within one month after the arrival of the Prince Regent, on receipt of 'advices from Mr Beath up to the period of the sailing of that vessel; 'and the following outline of an agreement for said establishment was 'agreed to.' It then goes on to provide, that a fixed capital of £60,000 sterling shall be advanced, and that in this partnership Campbell Rivers and Company were to be interested in three eighths, and David Beath in two eighths: 'In which proportions each party advance 'their share of the above-named capital, it being understood that what-'ever amount Mr Beath may be deficient is to be equally advanced 'by Campbell Rivers and Company, and Thompson Wright and Com-'pany.' It then provides, that Mr Beath was to have the management of the affairs in India, with either his store rent, clerks' salaries, and household expenses allowed him, *or* a fixed sum in lieu of the latter, as may hereafter be determined; that whatever household furniture should be considered necessary was to be purchased and shipped by the Prince Regent, which furniture should remain the property of the Company, should Mr Beath's permanent residence be determined, or otherwise to be considered a part of the adventure by the ship, and sold accordingly. It then provides by the third article, 'That should Mr Beath remain in India 'after the departure of the Waterloo and Prince Regent, and the other 'parties in this country not concur in the propriety of prosecuting the 'business in the manner provided for in the preceding resolutions, 'then a sum, to be mutually agreed upon, shall be paid to Mr Beath, as 'a remuneration for his loss of time awaiting such decision from this 'country, in addition to his necessary expenditure and passage home.'

Mar. 3, 1826.

My Lords, in consequence of this agreement, Mr Beath sailed in one of those vessels with this joint adventure. After he had sailed, and in the month of February 1819, three months after he had sailed, the appellants, Campbell Rivers and Company, and Thompson Wright and Company, wrote him a letter, intimating their opinion, that in consequence of the then state of the market, it would not be expedient that this establishment in India should take place; and therefore recommended him to arrange matters so as to return by the ship Prince Regent, when, upon his mature opinion upon the state of matters at Madras, they might be enabled to concert measures for a future establishment if necessary. It appears that Mr Beath had touched at Madras in his way out, and went on to Calcutta, where I apprehend this letter was received by him; and this letter was received by him previous to the return of the Prince Regent. In consequence of this letter, and as it will also be seen from his own views with respect to the establishment at Madras, (as to which I shall advert presently,) he returned in the Prince Regent to England. He then made a demand upon the appellants of two kinds; first, he demanded a remuneration for the trouble to which he had been put in this outward expedition, and in pro-

Mar. 3, 1826. viding the adventure to India, which he considered he was entitled to, he having acted as supercargo; and he claimed remuneration in that character. I should have stated to your Lordships, also, that this adventure to India turned out a most unfortunate one. The appellants allege that the loss sustained amounted to upwards of L.20,000. My Lords, the respondent also made a demand against these gentlemen for damages, in consequence, as he alleges in his summons, of this letter, written by them to him, recommending and desiring him to return to this country, which he contended was a violation of the contract he had entered into with them, one object being not only the prospect of profit upon the outward adventure, but the contingent prospect of advantage upon that establishment contemplated to be formed at Madras. He therefore in his summons, as I have stated, applied for remuneration for his trouble in superintending and collecting this outward cargo, and superintending the dispatching it to India, and for his trouble in going to India, and also for remuneration for damages in consequence of the defenders having departed from their agreement, and recalled him from India before he had any opportunity of exercising his judgment, whether it would be proper to form an establishment there or not.

My Lords, the defences put in by the appellants were, first,—as to the joint adventure,—that Mr Beath could claim no remuneration, because he was in the situation of a partner; and where a person engages in the character of a partner, he must be contented with his share of the profits stipulated for in the original formation of that partnership, and bear his share of the loss; but that he is not entitled to any additional remuneration for any trouble he may have taken in the business, unless in the articles there has been a stipulation to that effect; therefore, as to his first claim, the defence was, that he was a partner in that adventure, and that in his character of partner he could not claim any particular remuneration for the trouble he had employed in that adventure. As to the second part of his demand, they contended there was no ground for his being entitled to damages in that respect, as the establishment in India depended entirely upon a future contingency, namely, the probability of its being advantageous to form this establishment at Madras; and that before the return of the Prince Regent, it had been intimated to Mr Beath that the partners here considered it would not be advantageous, and that he, acting upon that, returned in the Prince Regent; and by the articles he was only to receive compensation for his loss of time while he might be detained after the departure of the Prince Regent, for the purpose of his forming his opinion whether that establishment ought to be formed there or not.

My Lords, upon the matter coming on before the Lord Ordinary, the Lord Ordinary pronounced an interlocutor, which it is very important to call your Lordships' attention to. He finds, 'That from the nature of the agreement betwixt the parties, the pursuer was induced 'to go to India, having a certain share in the concern with the defenders, 'with the view of establishing a mercantile concern in India. That 'it was provided by the agreement betwixt them, that should the pur-

'suer remain in India after the departure of the Waterloo and Prince 'Regent, and the other parties should not concur in the propriety of 'prosecuting the business, then a sum, to be mutually agreed upon, should 'be paid to the pursuer as a remuneration for his loss of time waiting 'such decision from this country, in addition to his necessary expenditure, 'and passage home. Finds, that within three months after the pursuer's 'departure from this country, by the ship Prince Regent, his part-'ners discovering that the trade would be most ruinous, and by 'which it is said the Company have lost to the amount of £20,700 upon 'the cargoes of two ships, the Waterloo and Prince Regent, they imme-'diately wrote him they had abandoned their intention of a mercantile 'settlement in India, as from the state of the markets it would be most 'ruinous, and desiring him to come home by the Prince Regent, which 'he accordingly did.' Then the Lord Ordinary finds, 'Therefore, that 'by the clause in the agreement, as he did not remain in India after 'the departure of the Prince Regent, he could not have a claim under it 'for a remuneration for his loss of time.' I beg your Lordships to observe, that the Lord Ordinary expressly finds, there had been no violation of the agreement—the counsel for the respondent do not, in argument, acquiesce in this finding of the Lord Ordinary; but they have not found any fault with this interlocutor, that is, there is no appeal on the part of the respondent. It must therefore be taken, that there is no breach of the agreement, whereas the summons is founded upon an alleged breach of the agreement, which the Lord Ordinary finds has not taken place. Then he goes on and finds, 'That independent of that 'clause altogether, the pursuer has a claim for some indemnity for his 'having acted as supercargo on board those vessels, and for his loss of 'time, by having embarked for India, with the view of settling there 'for the benefit of the common concern, which could never have been 'proposed to him without some indemnification, if no ultimate settlement 'did take place in India; as while the other partners were carrying on all 'the different concerns in which they were engaged in this country, the 'pursuer, by his going out and coming home in the Prince Regent, was 'exclusively employed in that concern, and could be employed in no 'other; and therefore he stood in this respect in a different situation from 'the other parties concerned; and his return by the Prince Regent, by 'the orders of the defenders, without any settlement in India, for which 'purpose he had carried his wife and family there, being a case unforeseen 'and unprovided for in the contract, he is entitled to a fair indemnifica-'tion on that account from the concerns in general.'

Mar. 3, 1826.

Now, first, with regard to this claim for indemnification, I must say, with great submission to the Lord Ordinary, that he has been making a new contract for the parties, instead of looking at the contract itself. I say, if a person enter into a partnership concern, in which he contributes a certain portion of capital and labour, unless he stipulate that he shall receive a greater remuneration for his labours than the other partners, he cannot claim it. The Lord Ordinary has found, that although this was

Mar. 3, 1826. a joint adventure to India, yet he is entitled to specific remuneration as the supercargo. It appears to me that that cannot be supported in point of law, these persons being partners in this adventure. If Mr Beath had chosen to have said, and it then would have been competent for the other parties to have considered whether they would acquiesce in it or not;—if he had said, Although you have advanced capital, I am expending all my time, and in addition to that share of the profit, I ought to be entitled to further remuneration for my trouble in procuring the cargo, and superintending its disposal in India, and providing for the return cargo—I say that would have been subject to their approbation; but he has done no such thing by these articles. It therefore appears to me, with great submission to the Lord Ordinary, that instead of construing this contract, he has been making a new contract; and therefore I cannot agree in that part of the finding of the Lord Ordinary, or the interlocutor of the Court of Session affirming that judgment, and finding that under this agreement Mr Beath can institute a claim for remuneration in respect of the adventure out in the character of supercargo, or that in that character he is entitled to remuneration. On the contrary, the defence is a valid defence in point of law, that he was a partner, and must be content with the profit, if any accrued from the partnership, and if any loss, he must sustain his share of the loss, and be content without any remuneration at all.

As to the other part of the case, it is said he is entitled to compensation in damages, in consequence of returning in the Prince Regent, the parties here, by their letter (which I shall call your Lordships' attention to presently), having intimated their opinion that it would not be proper to form an establishment in India. That letter was written three months after the departure of the Prince Regent. (His Lordship here read the letter by the appellants to the respondent.)

My Lords, before the receipt of this letter, it should seem a letter had been written from India by Mr Beath to these gentlemen, upon which considerable comments have been made at your Lordships' bar, in which he strongly expresses his opinion, that in his judgment it would not be desirable to form an establishment at Madras, but that if it was to be formed anywhere, it should be at Calcutta. As far, therefore, as the formation of the establishment at Madras is concerned, it appears that Mr Beath's opinion was in unison with the opinion of the parties at home; but looking at the agreement, it was the intention of the parties, that the establishment, if any, was to be formed at Madras. Your Lordships will perceive, that this agreement looks at the formation of this establishment as a contingent event. It provides for the event of Mr Beath's remaining in India after the departure of the Waterloo and the Prince Regent. If he remained in India for the purpose of seeing whether the establishment should be formed at Madras, without having received any intimation from the parties at home, who were to have the option of determining, the articles provide he shall have a remuneration for his loss of time while so waiting for that determination, in addition to his necessary expenditure and passage home. I should observe here, in passing, that as

to the expenditure and passage home, that is not denied—that has been paid—he has received a very considerable sum for that, and there is no question upon it; therefore I say, when Mr Beath went out, it depended upon a contingency whether this establishment was to be formed or not; and if the determination that it should not be formed was come to in time for his return by the Prince Regent or the Waterloo, or if he had come to that determination, I apprehend it is quite clear that the parties never meant to give him any remuneration for his remaining in India. It is expressed, that if he remained in India after the return of the Prince Regent and the Waterloo, waiting the decision from this country, then he is to receive compensation; but providing for that event shows, that, in the other event, if he returned in the Prince Regent, (it having been his own determination that no establishment could be formed there,) in that case he was to be entitled to no remuneration. Mar. 3, 1826.

My Lords, what are the facts? Before the return of the Prince Regent, he does receive from England a notification of the opinion of the parties here, that no such establishment should be formed. He does not himself allege that at Madras he had taken any means to form such establishment, but at Calcutta he had, and said, that if it was to be formed anywhere, it should be there. He returns in the Prince Regent—he is not detained in India after the return of the Waterloo—he has taken no measures for forming an establishment at Madras—he intimates in this letter, that if any establishment is formed, it should be at Calcutta; and it is quite clear that he conceived that he could form no establishment at Calcutta without the concurrence of his partners at home. He had returned from India in the Prince Regent, not having been detained beyond the return of that vessel, having received that notification from the parties at home, that their clear opinion was that no establishment should be formed there. He then institutes an action for damages upon this contract, which the Lord Ordinary finds has not been broken at all, for his having been put to expenses in taking his family out to form that establishment at Madras, which he took no steps to form, but if he looked to any establishment at all, it was at Calcutta.

My Lords, the Lord Ordinary has said that this was a casus improvisus—that the parties never looked at the event that has happened, of his returning in the Prince Regent. My Lords, whatever may be our conjectures as to what parties might have contracted for, or whether they contemplated certain events or not, I apprehend we are to consider the contract according to the language of it. The parties have contemplated that Mr Beath might return in the Prince Regent, and do not stipulate in that case to make him any additional remuneration for any loss of time in India, or any other expenditure; but the only event in which they contemplate remuneration to him, is in case he should be detained there to form his judgment; and if, in the interval between the return of the Prince Regent and receiving communication from home, he has been put to any expense and loss of time, he is to receive remuneration. My Lords, I must confess, however one might be influenced by the supposed hard-

Mar. 3, 1826. ship of this case upon this gentleman, your Lordships cannot proceed upon it: it would be the most dangerous doctrine in the world, if your Lordships, or the Court below, were to proceed upon the supposed hardship of the case, if this hardship should induce you to decide against the stipulations. Whatever may be the opinion as to the hardship of the case, it does not appear to me that the party has sustained any damage in consequence of any violation of this agreement; he has not brought himself within that provision that entitles him to damages,—the Lord Ordinary having found that no breach of the agreement had taken place,—but, as it appears to me, making a new contract on his part, and finding that, in consequence of what has happened, this gentleman is to receive remuneration; there being nothing pointing to remuneration under such circumstances, but, on the contrary, the articles provide he is to receive no remuneration. They contemplate his return in the Prince Regent, in which case it does not provide that he is to receive any additional remuneration, but he is to be content with his share of the profits.

On the whole, therefore, I must say, notwithstanding the great reluctance and great diffidence which I feel upon all occasions whenever I differ from the decision of the Court below; yet when I entertain a very clear opinion that the decision of the Court below cannot be supported, it is my duty to express that opinion to your Lordships; and if your Lordships do not give any intimation of an opinion different from what I have expressed, it is my duty to move your Lordships that these interlocutors be reversed.

JAMES CAMPBELL—MONCRIEFF and WEBSTER, Solicitors.

No. 6. CLAYTON and Others, (LOWTHIAN'S Heirs-Portioners,) Appellants.—*Shadwell—Abercromby.*
R. LOWTHIAN, Ross, and Others, (Executors of LOWTHIAN,) Respondents.—*Adam—Keay.*

Heir and Executor.—A purchaser of an estate over which there was an heritable debt, having bound himself to pay it as part of the price, and received a discharge of the price on that footing; and having granted a personal bond of corroboration to the creditor,—Held (affirming the judgment of the Court of Session) in a question between the heir and executor of the purchaser, that the debt was heritable, and formed a burden on the heir.

Mar. 3, 1826.
2d DIVISION. Lord Cringletie.

IN 1777, Mr Mackenzie purchased the estate of Netherwood, consisting of the lands of Conheathrig and others, and Mr Lowthian was cautioner for payment of the price. In order to pay a part of it, Mr Mackenzie borrowed £10,000 from Glover; to whom he granted an heritable bond and disposition in

security over the estate, on which infeftment was taken, and Lowthian bound himself to see the interest paid. Prior to his death, Mackenzie executed a disposition of his estate in favour of trustees, inter alia, for payment of his debts, and soon thereafter died, in 1781. His principal personal creditor was Mr Lowthian, who entered into an arrangement with the trustees for the purchase of the property, and an assignment to him of the whole effects of Mr Mackenzie. While this was in contemplation, Glover (who, through the death of Mackenzie, had lost his personal obligation for payment) pressed the trustees and Mr Lowthian for a personal bond of corroboration. To this the trustees declined to accede, and at this time Mr Lowthian also refused to agree. Mar. 3, 1826.

The sale of the estate to Lowthian was carried into effect in February 1782, by a disposition granted by the trustees on the narrative 'that he (Mr Lowthian) has fully satisfied us anent 'payment of the said stipulated price, of which he, his heirs and 'successors, are hereby for ever discharged.' They therefore disponed the lands, &c. to him and his wife, in conjunct fee and liferent, and to his wife, and her heirs and disponees, in fee; but under the declaration that 'the said Richard Lowthian and 'Sarah Aglianby, spouses, are to take upon themselves the pay-'ment of the whole heritable debts affecting the lands and estate 'of Netherwood, and fishing of Castle-Dykes, above disponed.' Infeftment followed, but the instrument did not contain any reference to this obligation.

In exchange for this disposition, Mr Lowthian granted to the trustees a deed of exoneration and discharge, narrating a variety of prior proceedings, and that it was therefore 'agreed between 'the said trustees and me, in order to avoid all farther expense 'and trouble, that I should become purchaser of the whole heri-'table subjects which belonged to the said George Mackenzie, at 'the rate of twenty-five years' purchase of the free rental there-'of; and should further get right to the whole other effects 'which belonged to him, and take upon myself the burden of 'paying all his lawful debts, and grant to them the discharge 'and bond of corroboration under-written. And seeing that the 'trustees, in conformity to said agreement, did, upon the 28th 'day of February last, execute and deliver a disposition and as-'signation in favour of myself and Mrs Sarah Aglianby, my 'spouse, and her heirs, according to my desire, of all and whole 'my lands and estate of Netherwood and Castle-Dykes, &c.; 'and have further, on the date hereof, made and granted in fa-'vour of me and my said spouse, dispositions and assignations

Mar. 3, 1826. 'of the whole remaining estates and effects, both real and personal, which belonged to the said George Mackenzie, with immediate tradition and delivery of the same; therefore I, the said Richard Lowthian, with advice and consent of my said spouse, have not only exonered and discharged them, the said trustees, of their whole intromissions with the defunct's affairs, but also am bound and obliged, and do, by these presents, in implement of my part of the said agreement, bind and oblige myself, my heirs and executors, and successors, whomsoever, to warrant and relieve, harmless and skaithless keep, the said trustees and each of them, and their heirs and successors, of all cost, skaith, damage, interest, and expenses which they may sustain, by and through their acceptance of and acting under the said trust-deed, or granting the foresaid conveyance to me and my said spouse any manner of way; and for that effect, that I shall with all convenient speed make payment of all the just and lawful debts resting due by the said George Mackenzie, and procure valid discharges of the same to all concerned; such debts being always constituted, in the first place, as accords to law; but against which, all legal and competent objections are hereby reserved to myself, and all others having interest therein, and in particular, without prejudice to the generality foresaid, the several debts and sums of money owing to the said defunct, which are to be specified in a list or inventory, to be given up to me by the said Simon Mackenzie, if that shall be judged necessary.'—A list containing Glover's debt was accordingly given in to Mr Lowthian.

On the 3d of June of the same year, Mr Lowthian granted to Mr Glover a personal bond of corroboration, in which, after narrating the bond and disposition in security for £10,000, and infeftment thereon over the estate, he states:—'And seeing that I did some time ago purchase the said lands and others, and that the said Richard Glover has agreed to supersede payment of the principal sum of £10,000, to the term of payment after mentioned, upon condition of my granting the obligation underwritten: Therefore, and in corroboration of the said bond and disposition, and infeftment following thereon, and without hurt or prejudice thereto, or to any other obligation granted to the said Richard Glover, for payment of the interest of the said principal sum, sed accumulando jura juribus,' he declared himself to be bound, 'as I hereby bind and oblige me, my heirs, executors, and successors, whomsoever, to content and pay to the said Richard Glover, his heirs, executors, or assignees, the foresaid

'principal sum of £10,000 sterling, and that at and against the Mar. 3, 1826.
'term of Martinmas next; with the said sum of £2000 sterling
'of liquidate penalty in case of failure; and the due and ordi-
'nary interest of the said principal sum of £10,000 sterling,
'from the term of to which term the said inte-
'rest is paid up, and yearly and termly thereafter, during the
'not-payment of the said principal sum.'

Mr Lowthian entered into possession, and although he regularly paid the interest on the heritable bond, yet he did not pay any part of the principal.

On his death, Mrs Aglianby, his widow, took possession of the estates; but some years thereafter, she was compelled by Mr Lowthian's heirs-portioners to remove. She then claimed terce and jus relictæ, and the question among others occurred, whether Glover's debt of £10,000 affected the jus relictæ? It was ultimately found, that it did not.*

Mutual actions of declarator were then instituted, by the heirs-portioners and the executors of Mr Lowthian, to have it ascertained on which of them the burden of paying the £10,000 lay. In their summons, the heirs-portioners alleged that it fell on the executors, seeing that by the bond of corroboration, and the other deeds narrated, 'the said Richard Lowthian incurred a personal 'obligation merely, to pay the said debt of £10,000 to the said 'Richard Glover, and the said debt is in every view a personal 'debt only in so far as regards the succession of the said Rich-'ard Lowthian; and although the heirs as well as the executors, 'by the Law of Scotland, are liable to the creditors of the de-'funct for payment of the just and lawful debts due by him, 'yet the executors are obliged to relieve the heirs of the person-'al debts, in so far as the executry and moveable estate extend.' And they concluded for relief accordingly.

On the other hand, the executors stated in their summons, 'that as the aforesaid debt was secured over the said defunct's 'heritable estate; as the disposition in his favour to the said 'estate, was declared to be burdened with the said heritable 'debt; as the said defunct stood duly infeft and seized in the 'subjects affected by the said heritable debt; and as the said 'heritable debt was formally corroborated by the said defunct, 'and the term of payment superseded in manner aforesaid; his 'heirs-portioners are, for these and other reasons, bound to sa-'tisfy and pay the foresaid heritable debt and interest.'—And

* See Ross against Aglianby, January 20, 1797. (4631, and No. 5. Ap. Foreign.) May 25, 1814.—(House of Lords)—14th Nov. 1816. F. C.

Mar. 3, 1826. to have granted a new heritable bond. The case of Arbuthnot is different from this. No discharge of the price was there granted, and the payment of it remained as an obligation on the purchaser; whereas here no such obligation exists, and the purchaser has adopted this heritable debt as his own.

Lord Robertson.—I concur in the opinions which have been delivered.

Clayton and others, the heirs-portioners, appealed.

Appellants.—The principle upon which all questions of this kind have hitherto been regulated, is the legal intention of the party who grants the obligation, in so far as can be collected from the nature of the obligation. If he grant an heritable security, and leave it undischarged at his death, he is presumed to have intended that his heirs should bear the burthen. If he grant a personal security, he is held to have burdened his executors. But in the present case, although the debt was real, it had not been made so by Mr Lowthian. He had merely granted a personal bond of corroboration, to come in place of that which Mr Glover had lost by the death of M'Kenzie; but not the original heritable bond, nor any additional real security. Mr Lowthian's obligation to relieve the trustees was for their safety, and did not better the situation of the creditors. The question, therefore, still comes to be, whether a person, who agrees to become personally bound for a debt, already heritably secured over an estate which he purchases, that heritable security not having been created by him, is to be held, by legal inference, to have intended to burden his heirs or his executors? But it has been decided, that the mere purchase of an estate burdened with heritable securities does not make the heir liable to pay, without relief, the debt so secured; and even if the party have granted a personal obligation to the creditors so secured for their debts, this is an obligation not upon the heir, but on the executors. In like manner, if a person purchase lands burdened with heritable debts, and retain a part of the price to discharge these encumbrances, but does not grant an heritable bond to the creditor, and if he die before the price is fully paid, the part so retained is a burthen on the executors, and not on the heir succeeding to the lands purchased. The case is different if the price be expressly declared a real burden; but that is not the case here. The security was personal, and was expressed in the form usually adopted when persons mean to give a security not intended to interfere with or impair a previous security; and it is the nature of the obligation granted for the price, not the

nature of the securities already existing, which is the true criterion of the intention of the granter, and the guide to direct on whom the burden ought to be placed. Mar. 3, 1826.

The judgment besides is inconsistent with the principles which rule accessory securities in general,—namely, that where they are merely accessory, they are not held to alter the nature of the original debt, so as to affect the question of succession. The only exception is, where an heritable security is given by the debtor to corroborate a personal debt. That makes the debt heritable, and burdens the heir; but a party corroborating by a personal security a real debt, renders his executors liable. Mr Lowthian did not constitute the real debt which he corroborated. The security he granted was merely accessory. It is not correct to say, that Mr Lowthian did in substance the same thing as if he had granted a new heritable bond with a personal obligation; for, although quoad Mr Glover the effect, as far as security went, was the same, there is this distinction, that he merely granted the personal corroboration; and the question is not to be regulated by the effect of the deed taken in conjunction with other deeds granted by strangers, but by the nature of the deed itself, and the legal intention of the party inferred from having granted it.

Respondents.—To ascertain whether debt falls on the heir, or on the executor, the proper inquiry is, whether it is a proper heritable debt affecting the estate, and a debt for which the deceased was directly responsible. If so, it affects the heir, whatever may have been the way in which the debt has been constituted. Allegation of intention in this question is irrelevant. The decision must depend on the condition in which the estate was left by the deceased, without any inquiry as to the motives that induced him to place the estate in that condition. Nothing short of a probative and positive declaration will defeat the rules of law. The only question, therefore, is, whether Mr Lowthian made the debt his, and whether it was an heritable debt. If the answer be affirmative, the burden falls on the heir. But the deeds prove that he did adopt it as his debt. It is incorrect to say, that, where a party buys an estate burdened with debt, and dies without paying the price, the executor is liable to clear off that burden. He is liable to pay the price to the seller, but the creditors in the real burden have no claim on the executor. They have against the estate. If a purchaser find it inconvenient to pay the whole price, in a case where there are already existing heritable debts, he may raise money by an heritable bond; or he may declare in the disposition such a sum to

Mar. 3, 1826. be a debt on the estate; or he may adopt the debts already existing (thus making them his own), and grant personal security in addition to security over the land. In that case, the debt is clearly heritable, and, as such, attaches to the heir. But that is precisely the present case. As far as intention can bear upon this question, the legal presumption is, that if the purchaser meant, instead of immediately paying up all the price, to burden his real estate with part of it, he also meant that the heir should bear the burden. Accordingly, if he stipulate with the seller that part of the price is to remain upon the property, then he indicates his intention that the heir is to be bound; because the obligation no longer stands on the mere contract to pay the price, but is fortified by thereal security.

Mr Lowthian put the debt precisely in the same situation as if he had granted an heritable bond. He preferred a bond of corroboration, because a real security was already effectually constituted, and did not require to be repeated. By that bond he made the debt his own; but he thereby no more intimated that he intended to burden the executors, than if he had executed an heritable bond containing the usual personal obligation.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

Lord Gifford.—My Lords, I beg to call your Lordships' attention to a case heard before your Lordships, in which Nathaniel Clayton is the appellant, and Richard Lowthian Ross and George Hinde are the respondents. My Lords, this appeal rose out of the following circumstances: In the year 1777, a gentleman of the name of Mackenzie purchased an estate in Scotland called Netherwood, for £20,000; he afterwards borrowed the sum of £10,000 from a Mr Richard Glover, and upon that granted an heritable bond, dated 27th December 1777. My Lords, Mr Mackenzie afterwards fell into considerable embarrassment, and his affairs were placed in the hands of trustees, with power to them to sell and convey his estates. Mr Mackenzie in the year 1781 died, leaving this heritable security upon the estate of Netherwood. The trustees sold the estate to a Mr Lowthian—that purchase was completed, and Mr Lowthian paid the price, and the trustees thereupon made a disposition of the estate in 1781, Mr Lowthian undertaking to indemnify the trustees against this gentleman. At the same time that this disposition was made, or very shortly afterwards, a deed of exoneration was executed by Mr Lowthian in favour of the trustees, against any demands that might be made upon them, and by which he took upon himself the payment of these debts; so that at that time he stood in a situation subject to this heritable debt existing of £10,000.

My Lords, things remaining in this situation, at that time Mr Glover required from Mr Lowthian in addition to the heritable security which he then held, that this estate should become chargeable for this debt. In consequence of that, Mr Lowthian, on the 3d of June 1782, executed a bond to Mr Glover. The bond recites the heritable security given by Mr Mackenzie to Mr Glover, and it then goes on to state the sale of the estate; that Mr Lowthian did some time ago purchase the said lands and others, and that the said Richard Glover has agreed to supersede payment of the said principal sum of £10,000, to the term of payment after mentioned, upon condition of my granting the obligation under written; 'therefore, wit ye me the said Richard Lowthian, in corroboration of the 'said bond and disposition, and infeftment following thereon, and with-'out hurt or prejudice thereto, or to any other obligation granted to the 'said Richard Glover for payment of the said principal sum, sed accu-'mulando jura juribus, to be bound, as I hereby bind and oblige me, my 'heirs, executors, and successors whomsoever, to content and pay to the 'said Richard Glover, his heirs, executors, or assignees, the aforesaid 'principal sum of £10,000 Sterling, and that at and against the term of 'Martinmas next.' My Lords, in this way the transaction as to Netherwood goes on; and the sale was completed—Mr Glover trusting to the proprietor of the lands, who had given this personal security in addition to the security that existed upon the estate. A long detail follows afterwards, on which it is not necessary for me to enter. It is sufficient to state, that Mr Lowthian being dead, a question arose between the heirs succeeding to the estate of Netherwood, and his personal representatives, as to by whom this charge of £10,000 upon the estate of Netherwood ought to be borne. The question, therefore, was, whether the heirs who obtained the estate of Netherwood, were to be considered liable, or whether it was to be paid by the executors out of the personal estate? Mar. 3, 1826.

In consequence of this dispute, mutual actions of declarator were brought,—the one being at the instance of James Marshall, and the appellant Nathaniel Clayton, as trustees for the four heirs-portioners of Richard Lowthian, who alleged that by this bond of corroboration, and the other deeds before narrated, Richard Lowthian incurred a personal obligation merely to pay this debt of £10,000 to Mr Glover; and that the debt was therefore a personal debt only, in so far as regarded the succession of Richard Lowthian; and although the heirs as well as the executors, by the law of Scotland, were liable to the creditors of the defunct for the payment of the just and lawful debts due by him, yet the executors were obliged to relieve the heirs of the personal debts, in so far as the executry and moveable estate extend. The trustees for the heirs therefore concluded that the respondents, the executors of Mr Lowthian, should relieve the heirs from the payment of that sum. On the other hand, the executors contended in their action, that as this sum was a debt secured upon an heritable estate, and as the disposition in favour of Mr Lowthian was declared to be burdened with the said heritable debt, and as the heritable debt was formally corroborated by the defunct, and the

Mar. 3, 1826. term of payment superseded in manner foresaid, the heirs were bound to satisfy and pay this debt, with the whole annualrent thereof, and termly failures appertaining thereto; and to free and relieve the said Richard Lowthian's executor, or next of kin, of the same, and of all the consequences thereof. These actions were conjoined, and came before Lord Cringletie, who, upon the 4th of June 1823, pronounced an interlocutor, by which he assoilzied the executors from the conclusions of this libel, and farther decerned against the heirs-portioners, conform to the conclusions of the libel, at the instance of the executors. The effect of this decision was, that the heir was to take this estate cum suo onere, that is, with this debt of £10,000. To this interlocutor his Lordship adhered, for the reasons which he assigned in a note (here his Lordship read the note of the Lord Ordinary); the heirs then presented a petition to the Court of Session, and the Court of Session adhered to the interlocutor of the Lord Ordinary, and afterwards refused a petition without answers.

Under these circumstances the case has been brought to your Lordships' House upon appeal. There can be no question as to the general law of Scotland, but the difficulty is in applying it to this case. The main case relied upon by the appellant is the case of Arbuthnot, in the year 1770. Your Lordships will recollect that the law stands thus:—If a man contracts to purchase an estate for a sum of money, and dies before that purchase is completed, his personal estate is liable to make good that purchase in favour of the heir; that is to say, the party's death does not put his executors in a different situation than he himself would have stood in; that upon paying the purchase money out of the personal estate, and acquiring the real estate, the real estate would have gone to his heirs, and he dying before it was completed, the heir could call upon the executor to pay that price. Upon that principle the case of Arbuthnot was clearly decided. The purchase had been made in that case at the judicial sale of an estate, burdened with a variety of heritable debts. The party had bound himself to pay a certain price, but died before that purchase was completed, and the heir at law said the executor was liable to pay that sum out of the debts recovered. It was contended on the part of the personal representatives, that inasmuch as the money would have been paid in discharge of real securities, therefore it ought to be considered as applicable to that purpose, and that the heir ought to take it cum suo onere; but the answer to that was, that the application of the purchase money makes no difference; as between the purchaser and seller he was bound personally to pay the price, and though the price would have been applied in payment of debts that existed as real charges upon the estate, yet that made no difference in considering the question between the heir-at-law and the executors. The only question was, out of what fund that price was to be paid. The Court held that the price not having been paid, although a personal bond had been given, it was a personal debt, as it affected the purchaser, and must therefore be paid out of the personal estate. I cannot see, therefore, how the facts of that case, or the principle upon which that decision rests, can be applied to the present.

I will shortly call your Lordships' attention to the state of this transaction. Mr Lowthian purchased the estate, then subject to a real charge of L.10,000; the purchase was completed by the trustees, and a disposition was made of the estate to Mr Lowthian, but subject to this heritable charge. My Lords, it seems to have been almost conceded at your Lordships' bar, that if the question had remained in that situation, without any bond of corroboration having been given in addition to the heritable security—that is, if Mr Lowthian had taken this disposition to himself, subject to this heritable bond which he had suffered to remain upon the estate, the heir would have taken the estate, subject to the payment of this debt. If that be so, it seems to me extremely difficult to say, that, because Mr Lowthian, in addition to that, had given this bond—a bond that expressly recognized the existence of this debt—it would be extremely difficult to say, that that would make any difference; because I apprehend the law of Scotland to be, that if there is a real charge, and in addition to that a personal security, the personal security cannot alter it so far as it regards the real charge, or the succession to the estate; and when your Lordships look at the bond as an addition to that real charge, it seems extremely difficult to maintain that this bond would make any difference. But without staying to inquire whether the law of Scotland goes to that extent, the question here is, whether, under the law of Scotland, Mr Lowthian, purchasing subject to this charge, and taking it as an encumbrance upon the estate, and giving a bond of corroboration and confirmation of that, adding to it no doubt his personal security, and supposing that Mr Lowthian had paid the whole price, and afterwards borrowed money upon an heritable bond granted by himself, that would have charged himself merely personally? If it would have done so, cadet questio. But if, having purchased and paid the price, the purchaser grants an heritable bond, it is admitted that the heir must take it cum suo onere, and cannot call upon the executor to indemnify him against that debt. Now, therefore, supposing this question was to be determined, as Lord Cringletie has determined it, upon the intention to be collected from this transaction, one might feel a difficulty in going to the full extent of the learned Lord's note, because in one part of it he states, that one ground of his judgment is, that Mr Lowthian would no doubt have granted an heritable bond if Mr Glover had required it. My Lords, whether the Lord Ordinary is right in his supposition, that Mr Lowthian would so have done, it is not necessary for your Lordships to determine. The only question is, whether, according to the principles of decided cases, and applying those principles to this state of facts, your Lordships can say, that in this case the debt must be considered a personal debt merely of Mr Lowthian, (in which case the executor would be liable to indemnify the heir;) or whether, looking at all the circumstances, in purchasing it with this charge, and confirming that charge by this bond, whether, under those circumstances, your Lordships are not of opinion that the Court of Session have come to a right conclusion in saying it was to be considered a charge upon the real estate, which the heir-at-law is bound to discharge? My Lords, other

Mar. 3, 1826.

Mar. 3. 1826. cases were referred to, which it is not necessary for me to state to your Lordships—the principle of that case of Arbuthnot I have already noticed. It is said, that the bond in that case was an heritable bond to be granted by the purchaser. Whether it was so or not, that case was under very different circumstances, and the principles applied to that decision cannot be applied to a case under very different circumstances. I have stated to your Lordships, that that case appeared to me the leading one, and for the reasons I have given, I think it does not militate against the decision of the Court of Session. The principle is perfectly clear, and the facts of that case bring it within the principle. The price had not been paid. The only thing done was to grant a personal security, and the price was to be applied in payment of the personal liabilities. Although, therefore, my Lords, it is not usual in moving to affirm a judgment, to state the reasons upon which that affirmance is moved, yet, considering this as a very important question, I have detailed to your Lordships the reasons for my opinion, that the judgment that has been pronounced by the Court below is right, and therefore I move your Lordships that this judgment be affirmed.

Respondents' Authorities.—2 Erskine's Institutes, 2, 5—14, 16, 17. 3 Erak. 8, 52.—Fraser *v.* Fraser, 13 Nov. 1804, affirmed on appeal.

Appellants' Authorities.—Arbuthnot *v.* Arbuthnot, 23d June 1773.—(5225)—M'Nicol, 16th June 1814, and 31st Jan. 1816. (F. C.) 2. Bell's Com. 8.—Ord *v.* Edmonstone, 22d Nov. 1671.—(5551)—Wishart *v.* Northeak, Jan. 7, 1638.—(5552)—Kames's Select Decisions, No. 223, p. 288.—1661, c. 32.

CLAYTON, SCOTT, & CLAYTON—A. MUNDELL, Solicitors.

No. 7.

JAMES MILLER, Appellant.—*Keay*—*Abercrombie.*

Lord and Lady GWYDIR, Respondents.—*Adam. D. Dundas.*

Landlord and Tenant—Penal Rent.—A tenant having entered to possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years, and not having complied with the rules so prescribed,—Held (affirming the judgment of the Court of Session) that he was liable in the penal rent, and that it was not a valid defence, that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord.

March 8, 1826. 2D DIVISION. Lord Cringletie. MILLER received from the factor on the Perth estate an offer of lease of the farm of Leystone for nineteen years. The offer contained this, among other clauses:—'With regard to the general mode of managing the farm, you shall always have one 'third part of the arable land under green crops and summer 'fallow, (the fallow uniformly getting four ploughings, and not

'less than twenty bolls of lime-shells laid on the acre,) and Mar. 8, 1826.
'shall not plough the same field more than twice for a white
'crop; and during the last three years of the lease you shall
'only have the one-third part of the arable land in crop and
'tillage, the other two-thirds shall be in grass, and which shall
'be cut only one year for hay, and pasture the other two. And
'should you fail to leave these two-thirds of the arable land,
'all or any of these three last years laid down in good heart,
'and properly sown with ryegrass and clover, or contravene
'any of the other regulations before laid down, then, for every
'acre managed otherwise than as above directed, you shall pay
'an additional rent of £4 Sterling per acre, for each year so
'mismanaged.' The lease was to commence at Martinmas 1801, and it was stipulated that, when it suited the conveniency of the proprietor, a regular tack should be extended, but that Miller's acceptance should in the meanwhile bind him.

Miller accepted this offer, and entered into possession. No regular tack, however, was extended, and he alleged that no copy of the missive was delivered to him. He did not pursue the rotation prescribed, but adopted that followed by and prescribed to the other tenants on the estate; and no objection was made, although the farm was annually visited, and he received several agricultural premiums from his landlord. The rent of the first of the last three years was discharged, and the farm was not in bad order at the conclusion of the tack. During the last year of the lease, an action was raised against him by his landlord, before the Sheriff of Perthshire, founded on the missive, and averring that he was bound, 'during the last three
'years of the lease, to have only the one-third part of the arable
'land in crop and tillage, and the other two-thirds in grass,
'which shall be cut only one year for hay, and pasture the
'other two, and also to have always one-third part of the land
'under green crops and summer fallow, the fallow uniformly
'getting not less than four ploughings, and twenty bolls of lime-
'shells laid on the acre;' and alleging that the stipulations had been contravened, and therefore concluding for the additional rent and damages, for miscropping, in so far as the tenant 'had
'not for the present, or the two last years, the stipulated quan-
'tity of grass or fallow, nor has the fallow received the stipula-
'ted quantity of lime.'

The Sheriff, after various proceedings, and finding that the rent for 1817 having been discharged by the pursuers, no claim for that year could be maintained, found, that 'the obligation on
'the defender in the missive of lease to have always one-third

Mar. 8, 1826. 'part of the arable land under green crops and summer fallow, cannot be held applicable to the three last years of the 'lease, the obligation respecting which is to have only one-'third part of the arable land in crop and tillage, and other 'two-thirds in grass, which shall be cut only one year for hay, 'and pastured the other two; that the defender had not established that the pursuer Lord Gwydir, or any other person 'having authority to do so, approved of the mode of management adopted by the defender, so as to preclude the pursuers 'from insisting for implement of the conditions of the missives 'of lease of the farm of Leystone, where the mode of management subsequent to crop 1817 was inconsistent with the said 'conditions—that although the missive of lease is not a regular lease, duly extended by a man of business, the conditions 'as to cropping during the three last years are precise, and not 'inconsistent with the other clauses as to two white crops) since 'the defender, by the introduction of green crop or summer fallow, might easily have satisfied that stipulation); and this interpretation arising out of the plain words of the missive, is 'still farther strengthened by the subsequent clause, "and should "you fail to leave these two-thirds of the arable land, all or any "of these three last years laid down with rye grass and clover" '—implying that the grass was to be three years old, otherwise 'that there would be a contravention;' and appointed the pursuer to give in a state pointing out the contraventions by the defender for the two crops 1818 and 1819. Thereafter the Sheriff found the deficiency of pasture grass to be 35 acres, and 53 decimals; and decerned, at the stipulated rate of £4 per acre of additional rent, for £142, 2s. 4d., with expenses of process.

Miller having advocated, and the Lord Ordinary having remitted simpliciter with expenses, he petitioned, and the Court, on the 2d March 1824, adhered as to the rents, but altered as to the expenses; and, on the 26th May 1824, refused a reclaiming petition, without answers.*

Lord Craigie.—I think that the tenant has been hardly dealt with. In the early part of the lease he was permitted, with the approbation of the landlord, to carry on a different rotation from that which had been prescribed; and even as to the three years, no objection was made till May 1819, being the last year. I therefore think that it is not just to subject the tenant in the penal rent; and that, in the circumstances, some notification should have been given to the tenant. Besides, the cultivation

* See 3, Shaw and Dunlop, No. 44.

which was followed was beneficial, and was similar to that which was prescribed in the extended leases of the other tenants on the estate. Mar. 8, 1826.

Lord Pitmilly.—This is certainly a hard case, but I do not think that we can alter the interlocutor. The first question is, What is the construction of the clause? If it had been unintelligible, and the mode prescribed impracticable, the tenant should have objected at the commencement of the lease; but he did not do so; and it appears to me that the Sheriff has put the correct interpretation on the terms of it. The management for the last three years was to be different from that of the preceding period, and we are bound to give effect to that which was stipulated by the landlord. The second question is, Whether the landlord has precluded himself, by acquiescence, from making his present claim? He has certainly done so for the year of which he received and discharged the rent; but there is nothing to cut off his claim for the two subsequent years.

Lord Glenlee.—I see no reason for departing from the Sheriff's interlocutor.

Lord Robertson.—I am of the same opinion.

Lord Justice Clerk.—I cannot put the same meaning on the tack which has been done by Lord Gwydir in his summons. We must hold the agreement as to the three last years to be separate from the general system, which applies to the sixteen preceding years. With regard to the first of these three years, the discharge of rent frees the tenant. It is clear that, for the sixteen years, the tenant carried on a different course of cultivation from that which had been prescribed, and that this was followed during the seventeenth year. Now, although the landlord saw that the tenant had not complied with the provisions relative to the three last years, yet he granted to the tenant a full discharge for this, which was the first of the three years, and he gave the tenant no warning that he was not proceeding in this course until the year 1819, when it was no longer possible to adopt it. I think that the landlord was bound in good faith to give that notice, and as it is not denied that the farm has been left in as good condition as any in the barony, I cannot adhere to the interlocutor.

Miller appealed.

Appellant.—The Sheriff's judgments adhered to on the merits by the Court of Session, are inconsistent with the terms of the summons, and his interpretation of the missive is widely different from the respondent's. Instead of loss from the appellant's

Mar. 8, 1826. management having arisen to the landlord, the system has been most beneficial and advantageous, much more than could possibly have been the case under the directions of the missive, which indeed were absurd and unintelligible. The appellant worked the lands like a skilful agriculturist, and his skill was acknowledged by his landlord. Besides, the landlord acquiesced in the management adopted.

Respondent.—The stipulations of the lease are intelligible to any practical agriculturist. The respondent did not, before the Sheriff, press the conclusion as to want of fallow with lime, during the three last years. The regulations were satisfactory to the landlord (who had a right to dictate them) and to the tenant, at entering into the lease, and must be fulfilled. The question is not as to good or bad management, but as to the obedience to the rules agreed upon. There was no consent by the landlord to depart from them, nor any acquiescence in the unwarranted management followed by the tenant.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £50 costs.

Lord Gifford.—My Lords, having heard the argument of the learned counsel, it does not appear to me that the Court of Session have made any mistake in this case. This was an action by my Lord Gwydir, against Mr Miller, who was his tenant, for a breach of covenant in respect of the lands held by him under lease. It appears that he stipulated by that covenant, that he would have, during the last three years of the lease, only one-third part of the arable land in crop and tillage, and that the other two-thirds should be in grass, and which should be cut only one year for hay, and pastured the other two. It was contended, before the Sheriff of Perthshire, (before whom this case originally went,) that the tenant had not a sufficient quantity of grass upon his farm to comply with his covenant.

The summons, after stating the covenant into which the tenant had entered, concludes in these terms: 'That by the said lease, which expires 'at the term of Martinmas first, the said James Miller is taken bound, 'during the last three years of the lease, to have only the one-third part 'of the arable in crop or tillage, the other two-thirds in grass, which shall 'be cut only one year for hay, and pasture the other two; and also to have 'always one-third part of the lands under green crops and summer fallow, 'the fallow uniformly getting four ploughings, and not less than twenty 'bolls of lime-shells laid on the acre.' It alleges, first, that there was not a sufficient quantity of grass; and, secondly, a deficiency of fallow and manure. The lease having provided an increased rent of £4 an acre in case of contravention of any of the covenants, my Lord Gwydir claimed that increased rent.

The defence set up by the tenant (the present appellant) was, that the farm was very properly managed, and that the course of cultivation required of him, as set forth in the summons, was impracticable; and also, that Lord Gwydir had acquiesced in the system of management which he had adopted, for that he had received rent for the year 1817, the first of the three years, in respect of which he makes his demand; and that in respect of the years 1818 and 1819, his lordship's factor, or managing-man, had been fully aware of the course which was pursued by the tenant, and had never given him the slightest intimation, that, in his opinion, he was conducting himself in a manner contrary to the contract. Mar. 8, 1826.

The Sheriff of Perth, in the first instance, and the Court of Session, before whom this case went subsequently, held that the tenant was liable for the increased rent during the last two years of the lease; but that Lord Gwydir having actually received the rent for the year 1817, the tenant was, by that circumstance, discharged from paying an increased rent, for that he must be considered as having acquiesced in the management pursued during that year.

My Lords, the first question is, Whether or not the complaint is adapted to the case? and if it is, then, secondly, whether the defence has been proved? Upon the first question I entertain no doubt that the summons does sufficiently state the ground on which a demand for increased rent is made by Lord Gwydir, namely, that the tenant had not a sufficient quantity in grass during the last three years of this lease. The next question then is, Whether Lord Gwydir has debarred himself from seeking an increased rent for the first of these three years, by having accepted the rent? whether that is to be considered as amounting to an acquiescence in the course pursued, and discharge of a tenant from the liability under which he had placed himself? The Sheriff of Perthshire, and the Court of Session, in affirmance of his finding, have decided that Lord Gwydir has, by that receipt of rent, precluded himself; and Lord Gwydir has not cross appealed.

My Lords, it has been argued very ingeniously, that if he acquiesced in this during the year 1817, he must have known that, by the course pursued, if it went on during 1818 and 1819, it could be grass only for two years, whereas it is contended that it must be grass for three years. My Lords, I see no ground whatever for holding that because Lord Gwydir accepted the rent for 1817, therefore he was to be considered as acquiescing in the tenant going on in breach of the covenant during the two subsequent years. It has been contended, that the factor of Lord Gwydir having seen on one occasion the mode of cultivation which was adopted, if objection was intended to be made, he ought to have expressed his disapprobation of that management. But really, my Lords, if it be expected that a landlord is to give notice to his tenant to this effect—"You have entered into a stipulation to manage your farm in such and such a manner; I have reason to fear you are not conforming to the stipulation; and I hereby give you notice, that if you do not manage your farm in that manner, I shall enforce the contract;" and if it is to be said, that,

Mar. 8, 1826. in case he does not give him that notice, he shall not be at liberty to enforce his contract, that appears to me to be imposing a condition on a landlord in Scotland, which is not called for by the law. I conceive it is not any part of his duty to give that previous notice to the tenant; and if he does not conform to the contract, he shall enforce it against him; and that the absence of such a notice cannot be considered as depriving him of his right. Under these circumstances, my Lords, it does not appear to me, that there is any ground for saying, that what took place in the two last years can be considered any acquiescence in the mode of management adopted during these two years. It is not pretended that he received any rent for the year 1818 or the year 1819, (for the last year it is impossible he could have received any rent till the contract had expired): however, it is sufficient to say, that for these two years no rent had been received; and it is upon that ground alone, that the Court of Session decided that his Lordship was precluded from demanding an increased rent for the year 1817.

My Lords, having taken this review of the circumstances, I feel bound to say, that it appears to me, there is no fault to find with the decision of the Sheriff of Perthshire in the first instance, and the Court of Session afterwards; and I shall therefore take the liberty of moving, that the interlocutors be affirmed; and in this cause I shall propose that they shall be affirmed with the sum of fifty pounds costs. It is stated that this farm was managed in the general in a proper manner. I should think that, under all the circumstances, your Lordships would be satisfied with awarding to the respondent that sum for his costs, instead of the precise sum which he may have expended, which very probably exceeds that sum. It appears to me that justice requires that the interlocutors be affirmed, and that some costs should be given to the respondent, who has been brought by the appeal to your Lordships' bar.

Appellant's Authorities—Murray's Trustees, 26th Feb. 1806, (No. 12 Ap. Tack.)
Respondents' Authorites—Grahame, 11th May 1789, (F. C. XVI. 425 note); Fraser, 25th Feb. 1813. (F. C.)

J. RICHARDSON, and SPOTTISWOOD, and ROBERTSON, Solicitors.

ALEXANDER COOPER, Appellant.—*Robertson.* No. 8.
ALEXANDER HAMILTON, Respondent.—*Keay—James Campbell.*

Appeal—Costs—Triennial Prescription.—1. Appeal entertained, and costs awarded on affirming the judgments complained of, where the interest of the Appellant amounted to twenty-four shillings, and L.30, 5s. 8d., being expenses of process; and where doubts were entertained as to the soundness of part of the judgments—the appellant having limited his appeal to the part affirmed.

2. Held (affirming the judgment of the Court of Session) that a party having, on a reference to oath, deponed that he believed a prescribed account had been paid by his factor, and was certain it was paid from having settled accounts with him; and these accounts not showing such payment, this was sufficient to elide the triennial prescription.

Mar. 14, 1826.
2D DIVISION.
Lord Pitmilly.

HAMILTON, a writer, raised an action before the Sheriff of Ayrshire against Cooper, for payment of an account, consisting of 19 articles, and amounting to L.16, 18s. Cooper pleaded prescription; and a reference was made to his oath by Hamilton. After much delay on the part of Cooper, he emitted an oath, in which inter alia he deponed, 'that the 1st and 2d articles of the account 'libelled by the said Alexander Hamilton, the deponent believes 'to have been paid by Mr Wodrow (his factor), and otherwise; 'and he is certain they are paid, from having settled accounts 'with Mr Wodrow, and otherwise, and from the receipts in pro-'cess.'—The Sheriff assoilzied Cooper, but did not find him entitled to expenses. Cooper then advocated as to expenses, and Hamilton on the merits. In Cooper's advocation, the Court remitted simpliciter; but in Hamilton's, a diligence was granted to recover the accounts referred to in Cooper's oath, from which it did not appear that the debt had been paid. Ultimately, the Lord Ordinary decerned against Cooper for 13 out of the 19 articles composing the account, including the two articles above deponed to; but found no expenses due to either party. Cooper petitioned, and the Court, on the 20th Feb. 1824, adhered,* and found him liable in the expenses of the answers, which were modified to L.30, 5s. 8d.

Lord Justice-Clerk.—I see no sufficient grounds for altering the interlocutor. Cooper pleaded the triennial prescription; and when a reference was made to his oath, he delayed for years to appear and depone. I lay out of view everything except his

* See 2, Shaw and Dunlop, No. 670.

Mar. 14, 1826. oath, and the accounts there referred to as the grounds of his oath. But these accounts do not support the oath, and therefore I think the interlocutor right.

Lord Robertson.—I concur. After a long litigation, Cooper made oath. That oath, however, is merely one of credulity—that he believes the two first articles to have been paid; and he refers, in support of this, to the circumstance of their having been paid by Wodrow, and that he had settled with him. But, on examining these accounts, no such thing appears.

The other Judges concurred.

Cooper appealed against these interlocutors, 'in so far particularly as the appellant has been thereby subjected in payment 'of the two first articles of the said account pursued for, and in 'the expenses of the answers.' The amount of the two first articles was £1, 4s. Sterling.

Appellant.—These two items are proved, by the oath and documents produced, to have been paid—the account is in other respects erroneous, and the judgments complained of unwarranted.

Respondent.—The appellant's oath does not prove payment, neither do the documents to which he refers. The two first items are the only items touched by the appeal.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L.100 costs.

Lord Gifford.—My Lords, This is really an unfortunate case, and a case that one cannot but regret should ever have been brought by appeal before your Lordships' House. But I fully concur in the observations made by the appellant's counsel, that the case being brought here, your Lordships cannot decide it in consequence of the smallness of the sum against the appellant; but that you must apply the same principles to this case that you would to a case where a very large sum was involved. My Lords, I feel it very difficult to support the interlocutors to the full extent to which they have gone. The grounds upon which they have disallowed the third and fourth items, appears to be applicable to the fifth and sixth, laying out of consideration whether the decision is right upon the first and second, which depend upon a different statement on the oath of the party. This question is to be decided entirely upon the oath of the party; and the question is, whether that oath does establish as to the first and second and fifth and sixth (those are the only items in dispute) *resting owing* on the part of the appellant to that extent. As to the fifth and sixth, if the Lord Ordinary has been right in finding, and the Court of Session in affirming his interlocutor, that the oath is not sufficient to establish the third and fourth items, it seems to me extremely difficult to

say it can establish the fifth and sixth, because the language is exactly the same, namely, that the party believes the sum to have been paid either by himself or Mr Wodrow. The great difficulty that presses upon my mind, is how to deal with the costs of this appeal, supposing your Lordships should be of opinion that the Court below has been right either as to the fifth and sixth, or the first and second items. Supposing those should be disallowed, there is a balance due to the respondent, and he would be entitled to the judgment. As to the remaining items, and supposing the appellant wrong upon the first and second, and right in the objections to the fifth and sixth, never having stated them to the Court below, but first at your Lordships' bar, the question is, whether your Lordships would visit him with the full costs, or whether it is consistent with your Lordships' practice, where interlocutors have been found wrong to a small extent, and have been varied, to visit the appellant with costs. One cannot but extremely deplore that the case has ever been brought to your Lordships' Bar. The whole amount in dispute is only four pounds, and as many hundreds have been spent in costs. The offer made by the respondent was extremely creditable, to leave the whole matter to arbitration, and to the determination of the appellant's own counsel. However we may regret that offer was not accepted, if, upon considering this case, your Lordships should determine there was a mistake as to some of these items, and you are obliged to alter these interlocutors, it will then be a question whether it is your Lordships' practice to award costs against the appellant. As to giving him costs, it is quite out of the question, where a party has so litigated, and succeeding to so small an extent as he will, supposing your Lordships are of opinion the Court below is wrong in those items. Your Lordships can never visit the respondent with costs. The only question is, whether your Lordships can relieve the respondent?

Mar. 14, 1826.

Upon these grounds, I should propose to your Lordships to adjourn the further consideration of this case till Friday, when I shall again attend your Lordships. As to the fifth and sixth articles, my apprehension is, that the oath of verity does not establish the *resting owing*—the first and second depend upon a different statement.

The question will be, whether, looking at the whole of the oath, there is a sufficient statement of *resting owing*, or whether he has not referred to Mr Wodrow's vouchers as evidence of their not resting owing, and thus made the case to depend on these accounts. It is to be regretted that the respondent should have been at the expense of contesting this at your Lordships' bar; but I am afraid your Lordships must decide this as every other case, not with a view to the hardship of the case, but looking at the principles of law to be applied to it. Between this and Friday, I will look more minutely into the oath of verity as to the first and second items, and state what my impression is; and in the meantime consider whether, consistently with your Lordships' practice in proceeding upon appeals, if your Lordships are under the necessity of varying these interlocutors, your Lordships can visit the appellant with costs.

LORD GIFFORD.—My Lords, there is a case which was heard before your

Mar. 14, 1826. Lordships in the course of last week, and which presents to your Lordships one of the strongest instances which has come under my notice of the length to which parties will carry their litigation on very trifling matters. This case has arisen out of certain proceedings which originated in the Sheriff Court of Ayrshire, which were carried afterwards into the Court of Session. The respondent, Mr Hamilton, having, as he conceived, a demand against the appellant, Mr Cooper, to the amount of £16, 18s., for various business done by him for Mr Cooper; and disputes having arisen between them; and Mr Cooper having instituted an action against Mr Hamilton for a demand supposed to be due by him, this action was raised against Mr Cooper in the Sheriff's Court. The demand consisted of various items for business done in the year 1806 and following years, such as extending a new tack of Temple Bogwood, 15s. 6d.; copy for the tenant, 8s. 6d., and various small items of that sort, closing with a charge 'for trouble and expense in management while you were absent with your 'regiment for eighteen months, ten guineas;'—constituting, as I have stated to your Lordships, a charge of £16, 18s.

My Lords, in defence Mr Cooper pleaded what is called in Scotland the triennial prescription, that this demand having existed for more than three years, was barred; and that plea was allowed. It then became competent for Mr Hamilton to put Mr Cooper on his oath as to the existence of the debt claimed to be due from him. He therefore called upon Mr Cooper to depone upon this subject; and proceedings were carried on for some time; and finally, Mr Cooper was examined upon his oath. The Sheriff conceived that what Mr Cooper had deponed upon his oath was sufficient to exonerate him from certain items of this demand, and therefore the Sheriff pronounced in favour of Mr Cooper, the present appellant; but although he considered him exonerated from the demand, he did not give him the expenses incurred in opposing it. Mr Hamilton not being satisfied with that decision, carried the matter before the Court of Session. It went, in the first instance, before the Lord Ordinary; and, on investigating the case, the Lord Ordinary adjudged that Mr Cooper had successfully defended himself to the extent of £12. He had sworn that there was no such demand due by him to Mr Hamilton, but with respect to several items, 13 in number, amounting to no more than the sum of L.4, 17s., he determined in favour of Mr Hamilton. His Lordship, however, found expenses due to neither party. The respondent, Mr Cooper, was not satisfied with that judgment, and particularly as the Lord Ordinary had not awarded him the expenses; and he complained, that, inasmuch as he had succeeded in resisting the greater part of this demand, he ought to have had the expenses of the proceeding adjudged to him.

Mr Cooper, being therefore dissatisfied with that judgment, brought the matter before the Inner House, who concurred in opinion with the Lord Ordinary, and thinking that the proceeding before them was a vexatious proceeding, they gave against Mr Cooper—not the former costs, the matter as to them having been adjudged by the Lord Ordinary, who had decided that no expenses up to the close of the proceeding before him

should be paid by either party to the other—but the costs of that hear- Mar. 14, 1826.
ing; and they pronounced to that effect.

Against that judgment Mr Cooper has appealed to your Lordships' House. It is important that your Lordships should attend to the manner in which he has appealed. It has been insisted at your Lordships' bar by Mr Cooper, not only that the Lord Ordinary was wrong in respect of the two items which he has allowed, and which are referred to in the papers before your Lordships, but he has also contended, that the Lord Ordinary was wrong in two other items. On looking, however, at the petition of appeal before your Lordships, I think your Lordships will be of opinion that he has confined his objection to those two items, and to that part of the judgment which awarded costs against him in the Court of Session. His petition is to this effect: 'That your petitioner being ad-'vised that the said interlocutors of the Lord Ordinary,' (enumerating them by date,) 'particularly as your petitioner has, by the said three last 'mentioned interlocutors, been subjected to the payment of the two first 'articles of the said account pursued for, and in the expenses of the an-'swer by the said Alexander Hamilton to his last mentioned petition, 'presented to the Court of Session, and modified to the above-mentioned 'sum, and in so far as they did not find that the petitioner is entitled to 'the costs in the said action, are contrary to law;' he prays that your Lordships will reverse, vary, or alter the said interlocutors appealed from as far as complained of.

Now, it does appear to me, that by his petition he has restricted himself to those subjects of complaint which he has enumerated in that petition; and I think your Lordships will not be inclined to give any great latitude of construction to this petition of appeal. Thinking as I do, that he has confined himself to those matters which he has made the subject of appeal, it appears to me that this is not a case in which your Lordships will be inclined to look beyond the terms of the petition of appeal; and I mention this, because certainly, with respect to two other items which have been stated at the bar, there is matter which might in some measure influence your Lordships' minds, if you were at liberty to go into it.

This account consisted of 19 items, and, as I have stated, there are two items which the appellant has particularly enumerated in his petition of appeal, amounting to £1, 4s.; so that this is, in effect, an appeal brought to your Lordships' House, in respect of a sum of £1, 4s., and the costs, amounting to about £30, of that last proceeding before the Court of Session. I do not mean to intimate, my Lords, that the smallness of the sum furnishes any objection to the right of the party to appeal from that part of the kingdom to your Lordships' House, when the grounds on which that appeal is brought are satisfactory. My Lords, Mr Cooper being put to his oath, deponed as to these first and second items, that he believed them 'to have been paid by Mr Wodrow, and is certain they are paid, by having settled accounts with Mr Wodrow, or

Mar. 14, 1826. 'otherwise, and from the receipts in process;' then he goes on to say, 'that he does not recollect to have examined Mr Wodrow's accounts as 'to these articles; and being specially interrogated, whether he has the 'accounts settled between him and Mr Wodrow during the time he was 'his factor, and if he has, to produce them, or transcripts of the entries of 'any sums paid to the pursuer or his brother; he objected that the pur-'suer is bound to prove resting owing by the defender's oath, and he 'must abide by that mode of probation. He is not entitled to tease the 'defender, and call for production of papers, which it would be difficult to 'find. To that it was answered, that as Mr Cooper had founded his be-'lief in some measure on the accounts, he was bound to produce them.' The Lord Ordinary was of opinion, and the Court of Session affirmed that finding, that looking at the whole of this answer, it was to be taken that that sum had been paid, as would appear by the accounts of Mr Wodrow, or otherwise, and from the receipts in process. Now, the receipts in process did not prove any such fact. They proved a settlement of the account in the year 1806, by which the sum of £1, 4s. had been allowed to Mr Hamilton; and it was said that £1, 4s. being the amount of these two items together, that was conclusive evidence that it was the same two items. But there was no evidence to show the nature of those items; and with respect to Mr Wodrow's accounts, as he had referred to them in his deposition, the Court of Session were of opinion that they might be referred to. Now, on referring to them, they did not show this money to have been paid; and therefore the Court held that it was a sort of qualified oath, referring to extrinsic matter, and to be proved by that extrinsic matter; and therefore they adjudged against him upon that; and, my Lords, after a good deal of consideration upon that subject, it does not appear to me that the Court of Session were wrong in that.

My Lords, I think your Lordships will be of opinion that this judgment ought to be affirmed with costs; because, if a gentleman will indulge himself in this spirit of vexation,—if he will come to your Lordships' bar to complain of a judgment for £1, 4s.—and if, being so come to your Lordships' bar, he does not establish clearly and satisfactorily to your Lordships that the Court of Session are wrong; I say, if a party chooses to come with such a frivolous complaint, and he fails to establish it, he ought to be at the expense of such proceeding.

My Lords, with respect to two other items, the answers to the third and fourth were in the following terms:—'That the deponent believes that 'they are satisfied and paid, but cannot recollect whether by himself or 'Mr Wodrow.' Now, the Lord Ordinary was of opinion, that, inasmuch as he swore he believed they were paid, and inasmuch as it was necessary to establish by his oath, not only that the debt once existed, but still subsisted, that swearing to his belief was sufficient to exonerate him; and therefore he adjudged for him in respect of those items.

With respect to the fifth, he deponed in the very same terms,—that he believes the same to be satisfied and paid, but cannot recollect whether by himself or Mr Wodrow; and with respect to the sixth, he deponed that

he knows nothing about it. My Lords, whether it was from some over- Mar. 14, 1826.
sight, or from what other cause, it is unnecessary now to determine; but the Lord Ordinary was of opinion he was entitled to the effect of that statement. However, it is not necessary to go farther than to say, that the petition of appeal does not point to these matters, but confines the matter of appeal to those which I have stated to your Lordships. I should have very much regretted, if there had been any slip which had prevented your Lordships doing substantial justice; but, I trust, that if we were enabled to have the whole case properly before the House, it would appear that that was not the fact. The matter of the appeal, however, being confined to the two first items of the account, and to the expenses upon those points, I have no doubt whatever as to the judgment which I ought to advise your Lordships to adopt. He complains, that the expenses were adjudged against him, because, he says, he had established a good defence to the greater part of the demands. If he had rested satisfied with the judgment of the Lord Ordinary, he would have had no expenses to pay. The Court of Session, considering the Lord Ordinary to be right, and affirming his judgment, were of opinion that he had brought the other party unnecessarily before them, and that, therefore, that party was entitled to his costs. They did not touch the antecedent expenses, for they had already been determined upon by the Lord Ordinary; and they did not at all interfere with his decision. If the appellant chose to quarrel with the decision of the Lord Ordinary, and he was not justified in doing that, it ought certainly to be at his own expense. I think your Lordships will be of opinion, that the Court of Session did not exercise a very unsound discretion in adjudging the costs against him. These being the circumstances of the case, which I have thought it necessary to detail to your Lordships, in consequence of the case being somewhat singular in its circumstances, I would conclude with moving your Lordships that these interlocutors be affirmed.

J. CAMPBELL—J. RICHARDSON, Solicitors.

No. 9.

JAMES M'BRAIRE, Appellant.—*Abercrombie.*
G. and W. HAMILTONS, Respondents.—*Keay.*

Process—Society—Mandate.—Circumstances in which it was held (affirming the judgment of the Judge Admiral and the Court of Session)—1. That a defender, who was sued as the surviving partner of a Company, was not entitled to object that the representatives of a deceased partner were not called, seeing that he declined to state who or where they were.

2. That a Company having employed agents to freight vessels, who accordingly did so in their own name, and the Company having failed to implement the charter-party, was liable to relieve these parties from damages awarded against them for non-implement; and,

3. That a decree which awarded a sum of sterling money, where the summons concluded for Halifax currency, was, quoad hoc, ultra petita, and a remit made to correct it accordingly.

Mar. 22, 1826.

1st DIVISION. Bill Chamber. Lord Eldin.

JAMES M'BRAIRE and Company were engaged in mercantile business, and had a house at St John's, Newfoundland. In September 1809, they wrote to George and William Hamilton of Quebec, (whom they were in the practice of employing as agents,) to freight for them a number of vessels for voyages from Quebec to Newfoundland, and from thence to Britain. In their letter they stated: 'We daily expect the schooner Hope from Scot-'land. She goes on immediately to Quebec. If you think there 'is a probability of bread and flour advancing at your market, 'please purchase on receipt of this 400 barrels of fine flour, (it 'must be fresh,) and 200 quintals of good biscuit, which will be 'about her cargo. Unless you are satisfied that the articles will 'rise, we would prefer your waiting for the vessel's arrival, as 'an accident may happen, and no vessel to be had to bring it 'down. It is highly probable that some vessels may come here, 'to proceed from hence with the cargoes on freight to Europe. 'We shall thank you to secure as many as you can for us. We 'shall load them in the usual time for Liverpool, Greenock, Bris-'tol, Cork, Waterford, Portugal or Spain, if a trade with the lat-'ter country remains open. Our freights are as follows, when at 'the highest. To any part in Great Britain or Ireland, £5 per 'ton, of 256 gallons; for oil, 3s. 9d. to 4s. a quintal; for fish in 'bulk to Oporto, 4s. 3d. a quintal; for fish, Lisbon, 4s. 6d. do.; 'Cadiz, 5s. do.; Alicanta, 6s.; to Valencia, 7s. 6d. In either 'case, the shipper pays two-thirds port charges, and 2½ per cent 'primage on the freight. We are informed that Mr Colman's 'schooner, St Anne, is to return and to proceed to the eastward.

'If so, secure her. Colonel Caldwell writes us about a new brig Mar. 22, 1816.
'he has on hand; if he sends her here, and places a price that we
'approve of, we will take her; otherwise give her a good freight.
'We beg your attention to this business; make the charters, and
'charge for your trouble. Send us as many vessels as you can;
'we have a large collection of produce, and in the winter we
'are generally puzzled for store-room. Last winter we had not
'less than 1500 quintals of fish; 65 tons of oil, and 200 tons of
'salmon in the country, which is too much, with our remains of
'goods, and other property, to lie so many months inactive; and
'although we expect several vessels, we shall be in want of ton-
'nage, in consequence of an abundant catch. We are thus far
'explicit, to press on you the service it will render if you pro-
'cure us a few vessels.' They also gave a discretionary order to purchase for them flour and bread. Hamiltons received this letter on the 24th of October 1809, and on the same day they returned an answer, stating, that 'We told China to give you the
'preference of loading the Mary at St John's, and Colman has
'promised us the refusal of the St Anne. People here laugh at
'the freights you talk of. Here vessels are in demand at £9 per
'registered ton, or 7 guineas, or 5 per cent per ton of 40 cubic
'feet, and we suppose seven or eight schooners would get loads
'down to you at £4 per ton, so that £4, 10s. for fish to Oporto
'sounds curious. We know we shan't be able to charter a ves-
'sel for you, but we will engage the preference, as if upon a
'speculation of our own, and give them orders to apply to you
'as our agents.' In another letter of the 27th of October, they wrote, that 'We have chartered the St Anne on the following
'terms: £4 per ton to St John's, and £6 from thence to Li-
'verpool;' and after mentioning that they were to send the flour and bread by her, and other particulars, they stated, 'We
'have exceeded your limits, but are satisfied are correct, and
'that you will benefit by our doing so.' No objection was made by M'Braire and Company; and on the 14th of November, a charter-party was executed between Hamiltons and the owners of the St Anne on the above terms, and by which the latter bound themselves to proceed with a cargo to St John's by the first opportunity of wind and weather, and after discharging at that port, and receiving a new cargo, to sail to Liverpool as soon as wind and weather would permit. The vessel was loaded with flour and bread for M'Braire and Company, and sailed on the 16th; but in consequence of the winter setting in suddenly, she could not get out of the river, and was obliged to put back to Quebec, where she was detained until spring. Of this M'Braire and Company were made aware by several letters, of which,

Mar. 22, 1826. however, they took no notice. In May she again sailed, and arrived safely at St John's. M'Braire and Company received the cargo, but refused to accept the vessel for her ulterior voyage to Britain, as agreed upon in the charter-party.

In consequence of this breach of engagement, the owners of the St Anne instituted legal proceedings against Messrs Hamiltons, and recovered a verdict for £1000 Halifax currency of damages, with £30 of interest, besides costs. The institution of this action was announced to M'Braire and Company, who merely denied that they had anything to do with it. Thereafter Hamiltons raised an action before the Judge-Admiral against James M'Braire, as the only surviving partner of the house of James M'Braire and Company, in which, after mentioning the facts, they stated the result of the proceedings to be, that 'the pursuers 'were compelled to make payment to the owners of the St Anne 'of the foresaid sum of £1000 Halifax currency (equal to the 'sum of £900 sterling money of Great Britain),' besides interest and costs. And the summons concluded for 'payment to the 'pursuers of these several sums, viz. of the sum of £1000 Hali-'fax currency, equal to £900 sterling money,' being principal sum, and also for interest and costs.

Against this action, M'Braire stated, as a preliminary defence, that the representatives of a deceased partner were not called; and, on the merits, that Hamiltons had exceeded their mandate as to freights—had been the cause of delaying the departure of the vessel—that they were aware that she was wanted only for the winter voyage, and that they ought, therefore, to have arranged the charter-party accordingly. In answer to these defences, Hamiltons denied that there was another partner, and required M'Braire to condescend on the names of his representatives; and stated that they had been ordered absolutely to secure the St Anne and other vessels; that the rate of freights specified in the letter of M'Braire and Company was not intended to form a limit, but merely to indicate what the rate at St John's was; that they had given due notice of having chartered the St Anne at a higher rate; that not only no objection was made, but M'Braire and Company had availed themselves to a certain extent of the charter-party by receiving the cargo; and that the delay in the sailing of the vessel arose from an accident alone, the consequences of which could attach only to M'Braire and Company, for whom she was engaged. The Judge-Admiral repelled the preliminary defence, 'in respect 'it is stated, on the part of the pursuers, that, prior to raising 'of this action, a letter was written by the pursuers' agent to

'the agent of the defender, calling upon him to point out where Mar. 22, 1826.
'the representatives of this deceased partner lived, or what
'other party the defender wished should be cited; that no an-
'swer was returned to this letter; and that the defender has
'not in any of his papers in this cause condescended on the
'names or residences of the representatives of the alleged de-
'ceased partner.' And on the merits, he found, 'that the let-
'ter of M'Braire and Company, of 16th September 1809, to the
'pursuers, contained, inter alia, a mandate to the pursuers,
'expressed in strong terms, to freight, for behoof of M'-
'Braire and Company, sundry vessels for voyages from Quebec
'to Newfoundland, and from thence to Britain, and, in parti-
'cular, gave instructions for the freighting of the schooner St
'Anne: That said letter contained a discretionary order to
'purchase a quantity of flour and bread for M'Braire and Com-
'pany, which it appears to have been intended should be ship-
'ped on board a vessel called the Hope, then expected from
'England: That said letter was received by the pursuers on the
'24th of October following: That recently thereafter the pur-
'suers freighted the St Anne for behoof of M'Braire and Com-
'pany, of which immediate notice was given: That though, in
'the letter of M'Braire and Company to the pursuers, the
'freights at Newfoundland are specified, yet it does not appear
'to have been specially intended to tie the pursuers imperative-
'ly down to any specific freight: That though the pursuers
'communicated to M'Braire and Company, quam primum, the
'engagement of the schooner and the rate of freight, and though
'it is ascertained that the pursuers' letters were received by
'M'Braire and Company, no complaint was made by the latter
'of the rate of those freights until the present question arose
'between the parties: That in resolving to send the flour and
'bread by the schooner St Anne (the Hope never having ar-
'rived), the pursuers complied with the spirit of M'Braire and
'Company's instructions: That the St Anne proceeded on her
'voyage as soon as these goods were put on board, and that no
'blame is imputable to the pursuers for the subsequent putting
'back and detention of the vessel at Quebec during the winter:
'That though some articles belonging to the pursuers were put
'on board the vessel, yet no facts and circumstances have been
'condescended on by the defender to justify the assertion that
'this was the cause of the vessel's detention: That, therefore,
'M'Braire and Company having refused to implement the char-
'ter-party, the defender is liable to relieve the pursuers of all
'the damage which they have sustained thereby: That the
'foreign decree founded on by the pursuers comprehends the

Mar. 22, 1826. 'claim of damages made by the owner of the vessel against 'them, in consequence of the breach of the charter-party, which 'was occasioned by the refusal of M'Braire and Company to 'implement the same, and appears ostensibly to be the measure 'of the claim now competent at the instance of the pursuers 'against the defender;' but, before answer as to the amount, appointed the defender to state any objections he had to the decree. The defender having declined to do so, the pursuers lodged a condescendence of their claim, which they stated to be £1090, consisting of £1000 of principal and £80 of interest, besides costs, making in all £1083, 7s. 6d. On advising that condescendence, the Judge-Admiral 'sustained the same, amount-'ing to the sum of £1083, 17s. 6d. with interest,' &c. and decerned accordingly; and thereafter, on considering a petition for the pursuers, he decerned, 'in addition to the sums former-'ly found due against the defender, for interest upon the prin-'cipal sum of £1067, 1s. 6d. sterling, from the 14th day of De-'cember 1819,' the date of the foreign decree.

The defender then presented a bill of suspension, which, together with answers, having been reported by the Lord Ordinary on the Bills, the Court refused the bill, with expenses; and, on advising a petition and answers, on the 19th May 1825, adhered.*

Lord President.—The letter of M'Braire and Company was not intended to limit Hamiltons as to the rate of freight. It merely mentions what was the rate at St John's. Throughout the letter they express great anxiety to have vessels secured for them, and mention, that, if they cannot agree with Colonel Caldwell for the purchase of his vessel, they will 'give her a 'good freight.' As to the delay, it certainly appears somewhat extraordinary that, at the season of the year when M'Braire and Company wrote to Hamiltons, they did not (as is now pretended) contemplate the possibility of the vessels being detained by the frost. I am clear that the bill should be refused.

Lord Gillies.—I am of the same opinion. M'Braire now attempts to take advantage of the specification of the rate of freights in the letter; but it is clear that the Company did not intend to limit Hamiltons to that rate; and accordingly no objection was made to that at which the vessel was afterwards chartered.

Lord Succoth.—I am satisfied that the instructions were not positive as to the rate of freights. The specification of them was

* See 4 Shaw and Dunlop, No. 17.

intended as a mere vidimus, and not to limit Hamiltons in pro- Mar. 22, 1826.
curing vessels. The ice appears to have set in earlier than usual, and no fault is ascribable to Hamiltons. I had some difficulty at first as to the allegation that she had been detained in order to put the goods of other people on board; but that is now satisfactorily explained.

Lords Hermand and *Balgray* concurred.

The defender appealed, and, in addition to his former pleas, maintained, that the decree of the Judge-Admiral was ultra petita, because it decerned for sterling money, whereas the conclusion of the summons was limited to Halifax currency.

LORD GIFFORD, after observing that he had heard nothing to impeach the judgments on the merits, but as there had been an inaccuracy in relation to the sum decerned for, no costs ought to be allowed to the respondents, moved, and the House of Lords ordered and adjudged, 'that the several interlocutors complained of in the said appeal, except as to the amount of the damages decerned for, be, and the same are hereby affirmed; and the Lords find that the claims of damages by the respondents (the pursuers) were for a sum in Halifax currency, with interest, whereas, by the interlocutors complained of, such damages have been decerned for in sterling money; and therefore, it is ordered that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of in this respect, and to find what sum in sterling money the pursuers ought to receive in respect of the damages decerned for: And it is farther ordered, that the several interlocutors be varied accordingly.'

J. CAMPBELL—SPOTTISWOOD & ROBERTSON, Solicitors.

ELIZABETH W. FRENCH, or HAY, and TRUSTEES; and A. NEISH, Appellants.—*Buchanan—Tindal.* No. 10.
J. MARSHALL, (Hay's Trustee,) Respondent.—*Keay—Menzies.*

Competition—Right in Security—Poinding—Bankrupt—Held (affirming the judgment of the Court of Session) That the holders of heritable bonds, who had not used poinding of the ground, had no preference over the proceeds of the moveables found on the ground, in a question with personal creditors claiming under a sequestration of the estates of the proprietor.

BY an antenuptial contract, between Miss Elizabeth Well- Mar. 22, 1826.
wood French and Mr Hay, her own fortune was secured to her- 1ST DIVISION.

Mar. 22, 1826. self in liferent, and to the children of the marriage in fee, excluding her husband's jus mariti. Mr Hay having purchased the estate of Balmekewan, uplifted his wife's fortune, applied it in part payment of the price of the land, and granted Mrs Hay an heritable bond over the estate, in terms of the contract of marriage.

Mr Neish also held an heritable bond with infeftment over the same lands.

Mr Hay was thereafter sequestrated as an individual, and as a partner of David Lindsay and Co., and Mr Marshall was appointed trustee. The estate of Balmekewan was sold under the sequestration, but the price proved insufficient to pay all the heritable debts secured upon it; and particularly that of Mrs Hay and Mr Neish.

The lands of Balmekewan, at the date of Mr Hay's sequestration, were chiefly in Mr Hay's natural possession, and there were found on them moveable property, such as horses, sheep, cattle, and other farming stock, grain, potatoes, hay, turnips, &c. of crop 1822. The crop then upon the ground, with household furniture, plate, books, &c. (after deducting expenses of sale, reapers' wages, and general expenses of sequestration), amounted to above £3000.

This sum the trustee proposed to apportion to the postponed heritable creditors pari passu with the personal creditors; but Mrs Hay and Mr Neish contended, that in virtue of the heritable bond and infeftment, they had a preferable right to the moveables, and consequently to the free price for which the moveables sold. In these circumstances, the trustee, in the scheme of ranking and division which he issued, stated, that 'he 'is advised that the claim of preference over this part of the funds 'made by the above heritable creditors is not well founded, par- 'ticularly for this reason, that prior to the sequestration no 'steps whatever had been taken by the said heritable creditors, 'by poinding of the ground, or otherwise, to secure their alleged 'preference; and consequently, that in the present case the 'debts due to the personal creditors of Mr Hay are entitled to 'be ranked upon the produce of the effects in question pari 'passu with any balance remaining due to the postponed herit- 'able creditors, in the same manner as upon any other fund be- 'longing to the sequestrated estate.' The trustee therefore repelled the claim of preference, and ranked the debts due to the personal creditors pari passu with the debts claimed by the postponed heritable creditors.

Mrs Hay and Mr Neish brought this decision under the review of the Court of Session by petition and complaint, but the Court,

on the 15th of June 1824, refused the petition without answers, and, on advising a reclaiming petition, also without answers, adhered on the 7th July thereafter.* Mar. 22, 1826.

The Judges were unanimously of opinion that there was not the slightest foundation for the claim of preference, and refused to allow the petitions to be answered, lest it should be supposed that the slightest doubt existed on the point.

Mrs Hay and Mr Neish appealed.

Appellants.—Every debt secured by infeftment may be made effectual by the process of poinding the ground, and the heritable creditor may sell, in satisfaction of his debt, all moveables found upon the lands, absolutely, if the moveables belong to the proprietor; and to the extent of the rent current or in arrear, if they belong to the tenant. But although poinding of the ground be the executive process, by which the heritable creditor enforces payment of the debitum fundi, yet his preference over the effects found upon the land, and which form the proper subject of real poinding, is not created by that process, but exists previously and independently of it. His preference is constituted by his infeftment alone, and the poinding the ground is in aid of his preference, not the cause of it. No doubt, this preference may be defeated, by an absolute sale of the moveables, or by perfected diligence at the instance of personal creditors; but a completed poinding of the ground by the heritable creditor would render the preference of the heritable creditor altogether indefeasible. Where, therefore, competition arises for moveable subjects found upon the land, an heritable creditor infeft will be preferred in opposition to any personal creditor who has executed only preventive or imperfect diligence by arrestment or poinding not completed—and the reason is, that the right of the latter is created by his diligence, whereas that of the former exists previously and independently. That the heritable creditor's preference is thus in some instances defeasible, does not affect the appellant's argument. For a superior or heritable creditor's right is not like the landlord's hypothec, which (under certain restrictions) follows the moveables. Besides, in the case under discussion, the moveables were still on the lands, and no complete diligence had been used by the personal creditors.

It is of no importance as affecting the present question, that the debtor's estate was sequestrated under the bankrupt act.

* See 3 Shaw and Dunlop, No. 167.

Mar. 22, 1826. That can never be held equivalent to a completed diligence. A sequestration may be considered as a congeries of diligences; but it operates as such only to the effect of preventing future preferences. With certain exceptions, (none of which apply here,) legal existing securities are not touched. But by the judgment complained of, a preference is given to the personal, and taken away from the heritable creditors. If this preference be given on the principle that the sequestration has the effect quoad the personal creditors of a personal poinding of the goods, by a parity of reasoning it must have the effect of a real poinding of the ground quoad the heritable creditors; and if so, the heritable creditors should be preferred.

Respondent.—An heritable creditor, in order to make his right available over the moveables on the lands, must use the diligence of real poinding. The personal creditor resorts to personal poinding. Both are adjudications of the moveables for debt. The heritable creditor requires this diligence to carry the moveables, just as much as the personal creditor requires it. The mere completion of the real right by the infeftment of the heritable creditor does not carry them. Something more, namely, poinding, must be done to give a separate and special right to them. To hold that the infeftment creates a nexus over the moveables, is inconsistent with the legal notion of the origin and efficacy of seisin. Infeftment is a symbolical transference of the solum, but not of the moveables, which are not partes soli. The seisin may naturally bring, as an incident to it, a power to obtain a preference by attaching the moveables, but so ipso of the seisin, they are not attached. Accordingly, there is, in the law of Scotland, no authority for a pre-existing preferable right to the moveables on the ground, vested in an heritable creditor, antecedent to and independent of any diligence of poinding. If there had been such an antecedent right, it would have operated to the effect of protecting the moveables from being carried off by personal creditors, or being transferred voluntarily by the owner—but it is admitted that in both these ways the heritable creditor can be disappointed. It is obvious, therefore, that the seisin does not possess the virtue ascribed to it by the appellants. If it did, and thereby vested in the heritable creditor a preference over the moveables, neither the act of the owner, nor diligence of the creditor, could be of any avail.

Besides, by the sequestration, the estate and effects of the bankrupt were transferred and adjudged to the trustee for behoof of the creditors, and thereby are protected from any preference, not existing before the date of the deliverance in the sequestration, or set aside by the statute—and here the appel-

lants held no preference before that date. It is even admitted by the appellants, that the preference for which they contend, is one defeasible by the voluntary act of the owner, or completed diligence of his personal creditors. If so, the preference is destroyed by the judicial transference under the statute. A sequestration has been truly described to be a congeries of diligences. It is therefore equivalent to a completed personal poinding—and consequently excludes the heritable creditor—and if, by parity of reasoning, it at the same moment operates as a real poinding in favour of the heritable creditor, the result is, that both parties come in pari passu—which is the mode of ranking that the respondent, as trustee, has adopted. Mar. 22, 1826.

The House of Lords ordered and adjudged that the interlocutors be affirmed with £150 costs.

Lord Gifford.—My Lords, the case of French and Marshall, which was heard before your Lordships a short time ago, is an appeal from certain interlocutors pronounced by the Court of Session, and I will shortly state to your Lordships the circumstances under which this appeal has been brought before the House. It appears that Mr Hay, on the 19th September 1822, was sequestrated, and that the respondent was duly elected and regularly confirmed as trustee on the sequestrated estate. It also appears that Mrs Hay's fortune, to which she became entitled under the settlement of her grandfather, was, by a contract of marriage between her and Mr Hay, secured to herself in life-rent, and to the children of the marriage in fee. The trustees under the settlement having denuded of the trust, Mr Hay afterwards received the sum of £10,000 sterling to enable him to pay part of the price of the estate of Balmekewan, and for this sum he granted an heritable security over that estate, in favour of Mrs Hay, in the terms of the contract of marriage. In this manner Mrs Hay became an heritable creditor of her husband. The respondent, as trustee, sold the lands of Balmekewan, and also the moveable estate, which consisted of cattle, household furniture, wines, books, and pictures, which were upon the lands, and were taken possession of under the sequestration. The Case then states the amount for which these effects were sold; and there not being sufficient funds to discharge the heritable debts, some of the heritable creditors were postponed; and amongst them, the appellants, who, conceiving that their heritable securities extended not only to the rents and to the price of the lands, but likewise to the moveables found upon the lands in Mr Hay's natural possession at the date of sequestration, they claimed to be preferred upon the produce, to the exclusion of the personal creditors, who individually had used no diligence. The claim of the appellants was resisted by the trustee, the respondent, who says, he is advised that the claims of preference over this part of the funds made by the above heritable creditors, is not well founded; particularly for this reason, that prior to the sequestration, no steps whatever had been taken by the said heritable creditors, by poinding of the ground

Mar. 22, 1826. or otherwise, to secure their alleged preference; and consequently, that in the present case, the debts due to the personal creditors of Mr Hay are entitled to be ranked upon the produce of the effects in question pari passu with any balance remaining due to the postponed heritable creditors, in the same manner as upon any other fund belonging to the sequestrated estate. The trustee, therefore, repelled the claim made by the postponed heritable creditors above mentioned to the proceeds of the effects above described; and ranked and preferred the debts due to the personal creditors of the said Philip Hay thereon pari passu with the debts remaining due to the postponed heritable creditors.

In consequence of the trustee having determined against this claim of preference on the part of Mrs Hay and her trustees, the matter was brought before the First Division of the Court of Session by petition, under a provision of the Scotch bankrupt law, 54 George III., cap. 137, sect. 45, upon which petition of the appellants the Court expressed a decided opinion that the respondent's judgment was well founded, and therefore refused the petition, without requiring any written answer. The case was again submitted to the Court upon a second petition, upon which occasion this interlocutor was pronounced: 'The Lords having heard this petition, 'refuse the desire thereof, and adhere to the interlocutor reclaimed against;' and they thought the claim so ill founded, and so little warranted by the law of Scotland, that the second petition, as well as the first, as I have already stated, was dismissed without requiring answers. The Court seemed to think it quite a novel claim, and quite new in the law of Scotland; and I will now shortly state to your Lordships its nature.

These trustees of Mrs Hay were heritable creditors of the bankrupt, and they contended, that although no steps had been taken by them previous to the sequestration, with a view to attach the moveables upon this estate, yet that they had, by means of this heritable security, a lien over this estate, that entitled them to a preference against the personal creditors of the bankrupt. It was not disputed on the part of the respondent, nor could it be, that an heritable creditor, if he used the diligence of poinding, as it is termed in Scotland, might make that right available over the ground over which the security extends; and, on the part of the appellants, it was contended, that though it were necessary to use that sort of diligence in order to obtain the value of moveable goods in satisfaction of a debt; and although they admitted, that until such diligence was completed, the debtor might dispose of the property bona fide to a third person; or that a personal creditor, if he used diligence against the property, and it was completed, would acquire a right in preference of the heritable creditor; yet they contended that the diligence to be used by the heritable creditor was not a process that gave them a right to the property, but merely corroborated their antecedent title which was vested in them by the heritable security; that the heritable security not only gave them a right over the moveables on the heritable estate, but that it gave them a sort of floating lien over the moveables that might be placed upon that farm; and that they were entitled, at the time of the bankruptcy, by means of this supposed lien, to a preference over the general creditors of the bankrupt. My Lords, if

such a right existed in the law of Scotland, one should have expected to have found it clearly laid down, as a right belonging to heritable creditors, in all the institutional writers, and to have found decisions affirming such a right. Mar. 22, 1826.

My Lords, it was not from any difficulty that I felt at the conclusion of the argument, that I postponed the determination of this case, because I was perfectly satisfied that the decision of the Court of Session was right; but from an anxious desire that I might not ask your Lordships to affirm that judgment, till I had an opportunity of considering the very ingenious arguments, used on the part of the appellants, and examining the authorities that bore upon this question. Since the case was argued, I have looked through the institutional writers, and I can find in none of them any such right stated to belong to heritable creditors.

The strongest passage relied upon, on the part of the appellants, in support of this claim, was a passage from Erskine's Institutes (2. 8. 32), in which he states, 'Yet the preference of a right of annual-rent in 'a competition with other creditors, depends not on the annual-renter's 'actual poinding, for he is entitled to the poinding, by the antecedent 'preference which his seisin had acquired to him; of which he cannot be 'deprived, though he should not exercise his right; which is meræ facul-'tatis, as to the annual-renter, and quite unnecessary, if payment can be 'otherwise got. Hence,' Erskine says, 'in a competition between an 'annual-renter and an arrester, the annual-renter was preferred, though he 'had only insisted in a personal action, as if he had been pursuing upon 'a poinding of the ground.'—Falc. 2. 1.

It is remarked, in the respondent's case, upon this passage, that Erskine here refers only to the case of Holland; and the respondent states, that it is evident that the learned author carried his views no farther than to a competition for the rent of lands under lease; that he is not there considering what the right of an heritable creditor would be to the moveables upon the heritable estate; and I find, upon referring to his smaller work, where the corresponding passage is to be found, namely, book 2d, title 8, section 15, that the view taken by the respondent in this case, that the author was considering merely a competition for the rents, is quite clearly established from the passage I am about to read. He says, talking of the right of annual-rent, 'And in a competition for those rents, 'the annual-renter's preference will not depend on his having used a 'poinding of the ground, for his right was completed by the seisin; and 'the power of poinding the ground arising from the antecedent right, is 'meræ facultatis, and need not be exercised, if payment can be other-'wise got.' Then he refers to the case of Holland, which was a case of competition for rents; and he says, 'As it is only the interest of the 'sum lent, which is a burden upon the lands, the annual-renter, if he 'wants his principal sum, cannot recover it, either by poinding, or by a 'personal action against the debtor's tenants, but must demand it from 'the debtor himself, on his personal obligation in the bond, either by re-'quisition, or by a charge upon letters of horning, according as the right 'is drawn.'

Mar. 22, 1826. My Lords, I only read this passage to show, that in this section those words occur, which are not to be found in the large work, namely, 'in competition for the rents;' and certainly he is only considering, what will be the case in a competition for rents; and it is to be observed, that the cases referred to by the appellants, almost all of them, relate to a competition for rents, and not to a preference for the moveables upon the farm.

If the arguments on the part of the appellants were correct, this singular consequence would follow. By the Scotch bankrupt law, section 5th, it is enacted, 'That when a person has been rendered legally bankrupt, 'as aforesaid, no poinding of the moveables belonging to such bankrupt, 'used within sixty days before the bankruptcy, or within four calendar 'months thereafter, shall give a preference to such poinder; but that every 'other creditor of the bankrupt, having liquidated grounds of debt, or de-'crees for payment, and summoning such poinder, or judicially produ-'cing the same in any process or competition relative to the goods or 'price thereof, before the said four months are elapsed, shall be entitled 'to a proportional share of the price of the goods so poinded, effeiring to 'the debt, deducting always the expense of such poinding, which the 'poinder shall retain in preference to the other creditors.' By this section, your Lordships will perceive, that no poinding of the moveables belonging to the bankrupt will be effectual under a subsequent bankruptcy, unless the poinding has been completed sixty days before the bankruptcy. Now, it was admitted, in the course of the discussion, and is distinctly stated in the papers, that if an heritable creditor use the diligence of poinding against the moveables upon an estate, over which another person has a personal security, it would be available over the moveables. Supposing, therefore, Mrs Hay had used and completed the diligence of poinding against the moveables upon this estate, it would be effectual against a personal creditor; but then a poinding by a personal creditor, if it were not more than sixty days before the bankruptcy, would be ineffectual under the bankrupt statute. If that were so, then this consequence would follow, that if the creditor had used such a diligence, and that diligence was perfected against the heritable creditor, yet, being within sixty days of the bankruptcy, it would be ineffectual under the bankrupt law. What would be the effect, I would ask, between the heritable creditors and the creditors under the bankruptcy? The heritable creditor could not have said, 'I have an antecedent lien upon this property, and by means of the 'bankruptcy I am to be referred to that lien;' because the trustee under the sequestration would have answered, this is an effectual and good poinding, and it is only by means of the bankruptcy it is rendered ineffectual against that creditor, and has not the effect to do away with the lien, but to distribute the effects among the creditors. If this lien had also existed, as was remarked at the Bar, one has great difficulty in seeing how questions have arisen between heritable creditors and a trustee on a sequestrated estate, as to fixtures. The case referred to, of Arkwright, to be found in the Faculty Collection, was a question between an heritable cre-

ditor and the assignees of a bankrupt's estate, the heritable creditor con- Mar. 22, 1826.
tending that certain property upon the estate ought to be considered in the nature of freehold, and consequently, as passing to him under the heritable security. On the other hand, on the part of the general creditors, it was contended that they were moveables, not affected by the heritable security, but passing under the sequestration for the benefit of the general creditors. If the heritable creditors had this lien over the moveables of the estate, it was quite unnecessary to raise that question, because he had a right of preference to all the moveables upon the estate thus secured to him. Therefore, to consider whether they were to be deemed fixtures or not, was quite unnecessary for him, because if he had this preference, it extended not only to the fixtures, but the moveables. I mention these cases to show, what appears to me as necessarily resulting from them, namely, a general opinion in the law of Scotland that this claim did not exist in practice; and so clear was the opinion of the First Division of the Court of Session upon this case, when it came before them, that in the first instance, as I have stated to your Lordships, they refused the petition without answers; and when it came before them a second time, from the short notes we have of what passed, it appears that one of the Judges was so surprised at such a claim being set up, that he asked whether there was anything certain in the law of Scotland; and as to the other Judges, the Lord President and Lord Gillies, they were all of opinion that this claim was wholly unfounded, and so unfounded that they were unwilling to give countenance to it by suffering the petition to be answered, lest it should be supposed that any doubt existed upon the law of Scotland upon the subject; and where a case has been thus treated, it has not been usual to ask your Lordships to affirm the interlocutors without costs, lest it should be supposed that your Lordships entertained any doubt upon the question, and thought it a fit subject to be discussed.

I have thought it necessary just to throw out these few observations upon the subject of this claim, because, being perfectly convinced that the claim is not founded on anything to be found in the institutional writers, and still less in any decision upon the subject, I should without any hesitation, at the conclusion of the argument, have asked your Lordships to affirm the judgment, were it not that upon this as well as upon every other occasion, I am always desirous of not acting upon the first impressions, but rather to take time to ascertain whether those impressions are well founded, and that I may satisfy myself that nothing has escaped my attention. After forming the best opinion I can upon this case, it does appear to me that not only is this claim unfounded, but so unfounded that I think your Lordships ought not to suffer the respondent, who represents a bankrupt's estate, to be put to any expense. I should therefore move your Lordships that these interlocutors be affirmed, and that they be affirmed with costs; because where the Court below have considered this so clear as to decide it in the manner in which they have done; and when your Lordships find upon consideration that you concur in their judgment,

Mar. 22, 1826. and where there is no reason to doubt upon the subject, I think these are cases in which your Lordships cannot do justice to the parties, without you take care, as far as you can, that the respondent, who comes to support the judgment, should not be put to any unnecessary expense. I should therefore move your Lordships to affirm these interlocuters, and to affirm them with costs.

Appellant's Authorities.—3 Erak. 6. 20. 2 Erak. 8. 32. 33—4 Erak. 1. 11. 12, 13. Mack's Ob. on Statute, 1469. c. 37.—2 Bankton, 5. 7, 8.—4 Stair, 23. 10. 14—2. St. 5—3. St. 2. 13—4. St. 23.—Kames' Law Tracts, No. 4. 2 Ross's Lectures, p. 320 et seq. and 392 et seq.—Kilkerran, p. 405.—Lady Kilhead, Nov. 2, 1748 (2785.) Webster, July 13, 1780 (2902.) Parkers, Feb. 5, 1783 (2868.) Tullis *v.* White, June 18, 1817, (F. C.) 2 Bell, p. 66 and 69, notes.

Respondent's Authorities.—3 Erak. 6. 20—4 Erak. 1, 2. 12.—2 Bell, 65, 66. 69. 2 Ross's Lectures, p. 442. 2 Bankton, 5. 7.—Hope's Major Practics, voce poinding ground, 28th June 1622. Gray, Mar. 24, 1626 (565.) Lady Mary Bruce, Feb. 15, 1707 (14092.)

SPOTTISWOOD and ROBERTSON—J. RICHARDSON, Solicitors.

No. 11.

W. HILL and Others, Appellants.—*Warren—Robertson.*
Rev. J. BURNS and Others, Respondents.—*Keay—Menzies.*

Testament—Trust—Implied Will—Mortification.—Held (affirming the judgment of the Court of Session) in a question with the next of kin, That a bequest to trustees was valid, whereby a testatrix appointed 'the residue of her estate to be applied by 'my said trustees and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow or neighbourhood thereof; and that in such way and manner, and in such proportions of 'the principal or capital, or of the interest or annual proceeds of the sums so to 'be appropriated, as to my said trustees and their foresaids shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the sole 'judges of the appropriation of said residue for the purposes aforesaid.'

April 14, 1826. 1st DIVISION. Lord Meadowbank.

ALEXANDER HOOD, of the Island of Mountserrat, after bequeathing certain legacies, conveyed the residue of his estate, real and personal, amounting to about £30,000, to his sister, Mary Hood, of Glasgow, and her heirs for ever.

Thereafter she executed a trust-settlement in favour of the respondents as trustees, in which, after leaving legacies to different individuals, she appointed the residue of her estate to be applied to charitable purposes, in these terms:—'I appoint the 'residue of my said estate to be applied by my said trustees and 'their foresaids in aid of the institutions for charitable and benevolent purposes, established, or to be established in the city

'of Glasgow, or neighbourhood thereof; and that in such way April 14, 1826.
'and manner, and in such proportions of the principal or capi-
'tal, or of the interest or annual proceeds of the sums so to be
'appropriated, as to my said trustees and their foresaids shall
'seem proper: Declaring, as I hereby expressly provide and de-
'clare, that they shall be the sole judges of the appropriation of
'the said residue for the purposes aforesaid. Moreover, for the
'ends and purposes herein before written, I hereby specially
'authorise my said trustees and the acceptors or acceptor, sur-
'vivors or survivor of them, from time to time, by a writing
'under their or his hand, to assume any other person or persons
'they shall think fit to be trustees or trustee in the room of such
'of the trustees before named as shall not accept or who shall
'decease; and it is hereby declared, that the person or persons
'so assumed, shall have the same powers, and be entitled to
'the same exemptions, as are conferred on the trustees herein
'named.'

On the death of Mary Hood, the trustees accepted and proceeded to act under her will, by paying the debts and legacies—appropriating nearly £6000 to different charitable and benevolent institutions in Glasgow and the neighbourhood,—and establishing there with the residue, (amounting to £10,000 3 per cent stock,) a charitable institution, (which they named "Hood's Charitable Institution,") for the relief of unmarried females in indigent circumstances.

Some years afterwards Hill and others, Mary Hood's nearest of kin, raised an action of declarator, in which they called the trustees as defenders, concluding that it should be found that the clause above quoted 'is not definite and certain in its ob-
'ject; is altogether vague, perplexed, inexplicable, and inopera-
'tive, and ought to be found and declared as pro non scriptis, and
'to be held as an ineffectual conveyance of the residue of the
'means and estate of the said Mary Hood, and that the said re-
'sidue forms a part of the intestate property and succession of
'the said Mary Hood.' At the same time they raised an action of multiplepoinding in name of the trustees, who in defence pleaded that the clause was definite and certain in its objects: '1st, By being limited to institutions for charitable and bene-
'volent purposes established, or to be established, in the city of
'Glasgow or neighbourhood thereof; and, 2d, By being limited
'to such institutions as to the trustees should seem proper.' The Lord Ordinary conjoined these actions, and thereafter, on advising memorials, assoilzied the defenders from the conclusions of

April 14, 1826. the action, but found no expenses due to either party. This judgment proceeded on the ground as explained in a note, 'that 'the purposes of the deed of settlement are sufficiently expressed 'in the deed, that even if there were admitted to be some am- 'biguity in certain of the terms employed, it is sufficiently cor- 'rected by the full powers conferred on the trustees.' To this interlocutor the Court, on the 14th of December 1824, adhered on the merits, but directed that the expenses incurred by both parties in the discussion should be defrayed out of the trust fund.*

Lord Hermand.—The principal objection to this will is, that it is not sufficiently specific; but as full powers are bestowed on the trustees, and a discretion is conferred on them as to the disposal of the funds, they have accordingly felt no difficulty in exercising them, and they appear to have acted agreeably to the will of the deceased.

Lord Balgray.—I certainly do not like the way in which this will was made, but that is not before us. The sole question is, whether it be in the power of a testator to put his estate at the disposal of another, and that disposal to be regulated by the will of that other alone; I think it is so.

Lord Gillies.—I have great doubts on this question, and I do not conceive that in deciding it, we are bound by the civil law. There is here a power given to assume other trustees, and to those assumed, to assume others. But who is to call them to account? There is no particular person or corporation to whom they are bound to give the proceeds. They may give them to their own friends, or they may apply them to their own use, for they do not appear to be under any control. Now look at our own decisions and you will see that such deeds have not been supported. In particular, in the case of Dick reported by Lord Kames, where there was not so ample a field as here, the deed was found ineffectual, and the same appears to be the law of England. But here the deed was obtained by undue influence, and expresses not so much the will of Miss Hood, as of the trustees by whose advice it was made.

Lord President.—I have no affection for deeds of this description, nor do I admire the way in which this one was concocted, but I am afraid that we are bound to give effect to it. By the Roman law, legacies left alieno arbitrio were sustained, and the same is the rule of our own law. See the case of Brown in 1762,

---

* See 3 Shaw and Dunlop, No. 283.

and Buchanan in 1806. In the former of these cases, a trust in favour of a third party, appointing the funds of the estate 'to 'be divided among my poorest friends and relations whom I may 'have forgot herein,' was sustained; and I cannot, in point of principle, draw any distinction between such a clause and the one before us. Indeed, if you look into any of the wills founding hospitals, you will find that they are almost all similar to the present one. I am therefore afraid that we must adhere. I, however, doubt extremely the power of the trustees to found the institution which they have done. They have no authority to found a perpetual establishment. The object of the trust was to distribute the funds among existing institutions;—but that is not before us, and I do not see that the relations have any interest to object to it. April 14, 1826.

Lord Balgray.—Perhaps they may have no interest in that respect, but they have a title vi sanguinis to call the trustees to account.

Lord Gillies.—I rather think that the next of kin have such a title, but they can have no interest to pursue.

Lord President.—We sustained the title of the executor in the case of Campbell and M'Intyre.*

Hill and others appealed.

Appellants.—The trust-deed does not express the will of the deceased, but of the trustees. The destination is uncertain and vague. It presents no specific or distinct object—refers to no individual or fixed body corporate—the place and time are indefinite, and the purpose inextricable. This uncertainty is not removed by the powers vested in the trustees. The delegation of the will of the deceased is one of the strongest circumstances against the legality of the bequest. There is no authority in the law of Scotland for holding generally that a bequest may be made arbitrio tertii; or that effect can be given to a delegated trust uncertain in its object, without specification of definite powers, or rule of conduct. If the trustees attempt to act without rules, then they make, what a Court of Justice could not pretend to do, a will for the testatrix. Besides, if the deed be sustained, there will be no party to call the trustees to account, if they misapply or betray their trust; so that, in truth, the trust is nothing but a trust without a beneficiary, which is absurd.

* See 3 Shaw and Dunlop, No. 93.

April 14, 1826. *Respondents.*—The bequest is not vague and inextricable. It has already been carried into effect as to the greatest proportion of the funds. The ulterior views of the trustees are in consistency with the charitable views of the deceased; and if not, that would not better the appellants, as there are innumerable existing charities to which the residue of the funds could be applied. There cannot be a doubt as to the legal construction of the word 'charitable,' whatever there might be as to the word 'benevolent.' If there were any obscurity, the ambiguous expressions would be interpreted according to the presumed intention of the deceased; and what might be absolutely unintelligible, would be held pro non scriptis. By the law of Scotland, a legacy may be left in arbitrio tertii, and consequently it is competent for a testator to make a bequest generally for purposes of a certain kind—vesting the trustees with discretionary power to carry them into execution. Those here given fully authorized the trustees to act in every respect as they have done. If the trustees incorrectly discharged the duties of the trust, or betrayed them, they would be accountable to the Court of Session, the Lord Advocate, the heir or next of kin of the deceased, the Magistrates of Glasgow, or any of the established charitable institutions in Glasgow.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, and that the costs of both parties be paid out of the trust-funds.

Lord Gifford.—My Lords, the question involved in this appeal, is as to the validity of a legacy, bequeathed by Miss Hood, for charitable purposes. It appears that this Miss Mary Hood, having acquired a large fortune by her brother—she having been before that in low circumstances—in the month of December 1817, made a settlement, by which she gave, granted, assigned, and disponed, in favour of the respondents as trustees, all her property, of whatever description, in trust,—in the first place, that they should pay her funeral expenses and her debts; and, in the next place, that they should pay sundry legacies, to the amount of nearly £9000, to certain of her friends and relations; and, in the third place, she appointed the residue of her estate to be applied, by her trustees and her foresaids, in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow, and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to the trustees should seem proper,—declaring, as she thereby expressly provided and declared, that they should be the sole judges of the appropriation of the residue for the purposes aforesaid; and moreover, for the ends and pur-

poses before written, she thereby specially authorised her trustees, and April 14, 1826.
the acceptors or acceptor, survivors or survivor of them, from time to time, by a writing under their or his hand, to assume any other person or persons, as they should think fit, to be trustees or trustee, in the room of such of the trustees before named as should not accept or should decease; and it was thereby declared, that the person or persons so assumed should have the same powers, and be entitled to the same exemptions, as were conferred on the trustees therein named.

My Lords, it appears that the rest of this lady's property amounted to a very considerable sum. About a year after executing this deed, namely, in the month of December 1818, this lady died, and the respondents, appointed by her as her trustees, accepted of the trust, and proceeded to act under it. They discharged the debts, and paid the legacies to the different legatees, and then they applied a proportion of the rest for charitable purposes in the manner directed. The matter thus remained until the month of March 1823, when the appellants, who are related to the deceased, raised an action, in order to have it declared that the clause of the trust settlement, containing the devise for charitable purposes, was not definite and certain in its objects; was altogether vague, perplexed, inexplicable, and inoperative, and ought to be found and declared as pro non scriptis, and to be held an ineffectual conveyance of the residue of the means and estate of Miss Hood; and that the residue formed a part of her intestate property and succession.

To this summons defences were lodged, which shortly stated the material facts of the case: denied that the clause sought to be reduced was either vague, perplexed, inexplicable, or inoperative; and insisted that its objects were definite and certain, for two reasons; in the first place, by being limited to institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow, or the neighbourhood thereof; and, in the second place, by being limited to such institutions as to the defenders should seem proper.—And then the appellants raised an action of multiplepoinding, in the name of the respondents, in which the appellants themselves were nominally called as defenders.

My Lords, upon this the Lord Ordinary, in the month of May 1823, pronounced an interlocutor, conjoining the original process with the process of multiplepoinding, at the instance of the trustees of Miss Hood, and finding the pursuer only liable in once and single payment, but in respect, it was stated, that the summons was raised in the name of the trustees, without their authority, and contained conclusions of declarator which they did not desire, reserved all objections to the competency of the conclusions of declarator being included in the summons; and in the conjoined processes, appointed the parties to give in mutual memorials on the whole cause to the Lord Ordinary, and that quam primum. This cause having been thereafter advised, the Lord Ordinary pronounced this interlocutor: 'The Lord Ordinary having advised the memorials for the 'parties, assoilzies the defenders from the conclusion of the action, but 'finds no expenses due to either parties, and decerns.'—The effect, there-

April 14, 1826. fore, of that interlocutor, was to establish the validity of those legacies and bequests.

To this judgment the Lord Ordinary, and thereafter the Inner-House, adhered; but with this variation, that the expenses of both parties should be defrayed out of the trust-funds.

My Lords, the case has now been brought by appeal before your Lordships, and the single question involved in the case, thus brought, is, whether this trust-disposition is void for uncertainty? I should have stated, that in the Court below there was at one time an objection raised to this trust-disposition, on the ground that it had been obtained by improper and undue means; but the single question now before the House, as I have already stated to your Lordships, is the legality and validity of this trust-disposition.

Now, my Lords, with respect to the construction of the term 'legacy,' the law of Scotland, like the law of England, adopts a liberal interpretation; and I must state to your Lordships, as the law, what Erskine (3. 9. 14) says: 'Deeds of a testamentary nature are more favoured, and therefore re-'ceive a more liberal interpretation than obligations inter vivos. Hence a 'testament, to which an impossible condition is adjected, is as effectual as 'a pure testament,—the law considering the condition as not adjected. 'Hence, also, unintelligible expressions in a testament or legacy are held 'pro non scriptis, and what remains plain has full effect; and, in general, 'though the words should be ambiguous, or even improper, they ought to 'be interpreted according to the presumed will of the testator, if by any 'construction they can be brought to it.'—It appears to me, my Lords, that the law of Scotland is more liberal in the interpretation of bequests for charitable purposes than other bequests. However, the great question is, whether this bequest be sufficiently certain with respect to the purposes for which the property is disposed? whether the character is described with sufficient certainty?

Upon this subject, several cases have been cited, which are stated in the printed case, and to which I will shortly call your Lordships' attention, to show the extent to which the Courts of Scotland have gone in the interpretation of instruments of this description.

The first case to which I will call your Lordships' attention is that of Wharrie, mentioned in page 4 of the respondents' case. In that case, which occurred in the year 1760, the testator, after appointing an executor, and leaving a number of legacies to individuals who were named, went on in the following words:—'All which legacies being paid, I ap-'point and ordain my said executor to remit the surplus of my money to 'Andrew Binnie, in the parish of Graitney, and William Johnstone, in 'Langrigs, to be by them divided equally amongst my relations not here-'in named.'—Your Lordships perceive, that, by this bequest, the property was given to these trustees, to be applied by them at their discretion among the relations of the testator not therein named. That case came before the Court of Session, doubts being entertained as to the vali-

dity of that bequest;—but it was found, by the ultimate judgment of the Court, 'That James Wharrie is not entitled, as nearest of kin, to claim 'the said residue to the exclusion of the testator's other relations not 'named in the said testament, among whom the trustees shall divide the 'same, and therefore repel the claim of the said James Wharrie in White-'haven, as being contrary to the purview of the testament.'—It is to be remarked, that the Court in this case expressly sustained a discretionary power committed to trustees of distributing a bequest, the objects of which were uncertain, and not specially defined in the settlement. April 14, 1826.

My Lords, in another case, which is the case of Murray v. Fleming, in November 1729, a husband disponed his landed estate to his wife in life-rent, and to any of his blood relations she should think most fit to be nominated by a writ under her hand in fee; a nomination was accordingly made after the husband's decease, and the right of the nominee having been objected to, the Lords found that this disposition, granted by the husband to his wife, did sufficiently enable her to nominate persons to succeed to the subjects disponed, and that she having accordingly exercised that power, the persons named by her have right to succeed.

There is another case, Brown's case, in which the testator having nominated trustees 'for managing his affairs, paying off his legacies, &c.,' they were found to have a discretionary power of distributing a legacy left to the testator's poorest friends and relations in the following words: 'And 'the remainder of the proceeds of my said means and estate, &c., to be 'divided amongst my poorest friends and relations whom I may have for-'got herein, or in any other deed to be made by me, in relation hereto, 'at any time during my life.'—My Lords, in that case, an action having been brought, containing a declaratory conclusion, for having it found and declared that a discretionary power was lodged in the trustees of distributing this residue among such of the relations, and in such proportions as they should judge proper, the Lords ultimately found 'that the trustees 'are vested with a discretionary power to divide among the poorest friends 'and relations of the said John Brown, the remainder of his estate, after 'payment of his debts and legacies, and the expenses of executing the 'trust, and that without distinction, whether the said relations are con-'nected by the father or mother's side, and also without distinction of de-'gree.'

My Lords, however, there is one case, which approaches much more nearly to the present in its circumstances, and which was the case of a charitable disposition, in which, as it appears to me, the discretion was made more large than that contained in the present case. An extract from the will of Alexander Horn is printed in the appendix to the respondent's case, in which the testator said this: 'I give and bequeath to my beloved 'wife, Jean Horn, the proceed and income of £3500, share and interest, 'in the old South-sea annuities, according as the same shall become due, 'and payable, during the term of her natural life; and from and after her 'decease, I give and bequeath the said £3500, share or interest, in the

April 14, 1826. 'said old and new South-sea annuities, unto the Right Honourable the 'Lord Provost of the City of Edinburgh, the Bailies, Dean of Guild, and 'Treasurer of the said city, for the time being, and their successors, upon 'the trusts hereafter mentioned, and none other, (that is to say) upon trust, 'that they and their successors do, and shall distribute and pay the an- 'nual proceed and income of the said £3500, share or interest in the old 'and new South-sea annuities, to and amongst poor indwellers; that is, 'day labourers residing within the said city of Edinburgh, and in the pa- 'rish of Nether Libberton, near the said city, and in Westport, Bristo, and 'Potter-row, only in the parish of Westkirk, also near the said city, such, 'I mean, whose work lies mostly without doors, and consequently may be 'hindered from their labour very often by rain or other inclemency of the 'weather, and such who have not received alms from the parish, or place 'where they, for the time being, shall dwell, in the proportions following.' And then he states in what proportions they should be distributed: 'The 'annual proceed and income of £1500, part thereof to such poor labourers 'as aforesaid, as shall, for the time being, belong to the said city of Edin- 'burgh; the annual proceed and income of £1000 more thereof to such 'poor labourers, as aforesaid, as shall, for the time being, belong to the 'said parish of Nether Libberton; and the annual proceed and income of '£1000 residue thereof, to such poor labourers, as aforesaid, as shall, for 'the time being, belong to the Westport, Bristo, and Potterrow, only in 'the said parish of Westkirk; and my will and desire is, that the proceed 'and income of the said £3500, share or interest in the said old or new 'South-sea annuities, shall be annually distributed and paid in the pro- 'portions aforesaid, on or before the 25th day of the month of Decem- 'ber, yearly, in every year, and that the proceed and income of £1500, 'part thereof, shall be distributed and paid yearly to, and amongst, such 'poor labourers as aforesaid, residing within the said city of Edinburgh, 'by my trustees, the said Lord Provost of Edinburgh, and Bailies, Dean 'of Guild, and Treasurer of the said city, for the time being, as to their 'discretion shall seem meet; and that the proceed and income of the re- 'maining £2000 thereof, herein before appointed, for the two out parishes 'or places aforesaid, in equal proportions, shall be paid by my said trus- 'tees to the Bailies or Chief Magistrates, for the time being, of each re- 'spective parish, and be by them distributed yearly to and among such 'poor labourers as aforesaid.' Now, your Lordships perceive in this case that the objects of the testator's bounty were to be 'poor indwellers,' that is to say, day labourers, residing within the city of Edinburgh, and it was to be left within the discretion of the trustees, amongst what persons of that description they would distribute. My Lords, the only case alluded to as of a contrary description, is a case mentioned in the printed case of the appellant, the case of Dick, and I mention that case, because I learn that great doubt was entertained of the propriety of that decision at that time. My Lords, in the case of Dick, Dame Janet Dick, Lady Prestonfield, executed, December 1751, a settlement of considerable funds on Sir

John Cunningham, her eldest son, and Anne Cunningham, her eldest daughter, and the survivor, as trustees for the end and purposes following; first, the trustees are appointed to add and join together the subjects disponed, so as to make up a total of £6000 sterling, to be lent out upon land or other sufficient security, and then they are appointed to apply and bestow the yearly interest towards the education and support of such of the granter's descendants as should happen to be in want, or stand in need thereof, and that at the discretion of the trustees; and, in the third place, failing descendents, the capital is to return to her nearest heirs. This deed being whimsical and irrational, the trustees, it is stated, refused to accept; that thereupon a process for reducing the settlement was brought by the heir-at-law, in which were called all the descendants in being of Dame Janet Dick. None of them made opposition, but Mrs Ferguson for herself and children. Several grounds of reduction were insisted on, chiefly the non-acceptance of the trustees; and it was urged that the present event is a casus incogitatus, for which there is no provision made in the settlement; the deed is at an end by the common law, for it supposes the acceptance by the trustees, and there are no means prescribed to carry it on independent of them. 'The matter then,' the reporter states, 'resolves into 'this, whether this Court, as a court of equity, ought to supply the de- 'fect? The answer to this question is obvious. Seeing the settlement has 'fallen at common law, and that the subjects contained in the settlement 'belong to the nearest heirs, it never can be equitable to deprive them of 'their right, especially to support a whimsical intention in favour of re- 'mote descendants, who possibly may never be in want, and never have 'occasion for the money. Secondly, the defender has no proper interest 'to oppose this reduction; the settlement leaves the distribution entirely 'upon the discretion of the trustees, and, therefore, suppose the trustees 'had accepted, no descendant of Dame Janet Dick could have a claim 'in law for any sum out of the trust subject. If so, they cannot, by the 'repudiation of the trustees, qualify any loss or lesion, that can be regarded 'in a court of justice;' and then it is stated, 'The Lords found the deed 'ineffectual by the non-acceptance of the trustees.'

April 14, 1826.

My Lords, if that were the ground of the decision, it does not appear to me to affect the present case. It might be a question after the decisions to which I have referred your Lordships, whether the refusal of the trustees to accept the trust would defeat the legacy? However, it is unnecessary to consider that question in this case, because the trustees have accepted the trust reposed in them. They say, on looking into the pleadings in the cause in the Advocates' Library, it will be seen that the case in a great measure rested upon the uncertainty of the objects of the termination of the trust, and the inexplicable nature of the duties of the trustees; and it is also said, that on the answers there is this note holograph of Lord Kames: 'In answer to the arguments urged here, I put this 'single question, whether, upon the trustees accepting, a process could be 'brought against them by any descendant of the testator, claiming a sum

April 14, 1826. 'out of the product of the trust estate?' Now, he says, in answer to that, 'Certainly not; because the settlement leaves it entirely upon the discre-'tion of the trustees to distribute as they should think proper.' And, therefore, Lord Kames seems to have been of opinion, that if they accepted, the discretion was so entirely vested that it was impossible for any descendant of the testatrix to claim a sum out of the product of the trust estate. 'Then, if so,' he says, 'it follows necessarily that the trustees 'might have conveyed the estate to the heir-at-law;' and then he says, 'they have in effect done the same thing by repudiating the trust. No 'individual is injured, because no individual has a claim at law.' So that, according to this note of Lord Kames, he appears to have been of opinion that the heir-at-law being one of the persons to whom the trustees might have conveyed the estate, the effect of the circumstance of the trustee repudiating the trust was to give the property to the heir-at-law, because, he says, they might have conveyed the estate to the heir-at-law, and they have in effect done so by repudiating the trust; and therefore, he says, no person is injured, because no individual has a claim at law. I cannot conceive that the decision of that case at all breaks in upon the authority which existed in the law of Scotland, in respect of a bequest, leaving it in the discretion of trustees to apply funds for definite objects amongst whom the trustees thought fit to apply those funds. It does not appear to me that that case at all breaks in upon the current of authorities; and I cannot but observe, that Lord Gillies, who appeared to have thought that that case did break in upon the general current of authorities, afterwards, in a subsequent observation made by him, states, that in this case he placed great reliance on the mode in which the will was made, not by herself, but by the trustees—namely, that Miss Hood had been stated to have made this will, not from her free will, but that she had been influenced into that disposition by other persons. Now, that is not the question in this case, as I have stated to your Lordships. The ground on which the action is brought is entirely the supposed invalidity of this legacy, arising from the uncertainty of the objects upon whom this property was to be bestowed. The action is not at all founded upon the supposed undue influence used by these trustees, or any other persons; therefore, I cannot but observe, that the observation made by Lord Gillies takes off very much from the remarks he had previously made upon the only question upon this case, namely, the question of the validity of the disposition.

Now, my Lords, it appears to me, that this being a bequest for charitable purposes, can admit of no doubt as to the nature of the disposition. It is not to be applied by the trustees for charitable purposes generally, but it is expressly stated in what description of charitable purposes these funds shall be bestowed,—for they are to be bestowed in aid of the institutions for charitable and benevolent purposes, established, or to be established, in the city of Glasgow, or neighbourhood thereof: and therefore the discretion of the trustees is limited to such institutions as then existed,

or might be established before the time that it became their duty to apply this fund in the city of Glasgow, or the neighbourhood thereof. It has been argued that the words, 'the neighbourhood thereof,' are very uncertain, and that it is difficult to define the territory round the city of Glasgow to which these words apply; but I apprehend, that if those words should be considered uncertain, if the question should arise, whether any institution was fairly within the meaning of the testatrix's will, as within the neighbourhood of Glasgow, in that view of the case, at all events, the limits of the city of Glasgow are sufficient to impose upon the trustees the duty of applying this fund. April 14, 1826.

My Lords, another difficulty was raised in the course of the argument, namely, that there was no mode by the law of Scotland by which these trustees, if they exercised an undue discretion or abused the trust, could be called to account in the Court of Session. My Lords, I apprehend that, according to the case stated at the bar, no difficulty would occur in compelling these trustees to apply these funds according to the intention of the testatrix, or to call them to account in the Court of Session, for a misapplication of the funds, if they should be found so to misapply them. It is unnecessary now to consider by whom such an action should be raised; but on that difficulty being stated, and observed upon by the Court, my Lord President stated this; 'We found lately in a case of mortifica-'tion in the school of the parish of—I forget the name—of Dr M'In-'tyre, that the executors had a title to pursue;' that is, that they had found there that the trustees might be called to account before the Court of Session, and that the nearest relation had power to interfere. My Lord Gillies admits that they have such a right, but he says, that here they have no interest. It is true, they have no interest in a pecuniary point of view; but I apprehend there are persons who have a sufficient interest in compelling the trustees to perform the trusts reposed in them; and although my Lord Gillies says that they have no interest, I apprehend that he does not mean by that, that they have no interest in the funds. Although they could not come and claim the fund for themselves, they might call the trustees to account, if they neglected their duty, or abused their trust.

My Lords, I have said thus much—though your Lordships may have collected from what I have said, that I mean to propose to your Lordships to affirm the interlocutors,—I have said thus much, because this case, in point of value, is of some importance, and because the principle is important.

My Lords, it has been urged, that if your Lordships should be of opinion that you ought not to alter this interlocutor, still the appellants should have their costs out of this fund, which is devoted to charitable purposes; and it was supposed that your Lordships would be inclined to give them their costs out of this fund, because the Court below had already done so. Considering it as a case in which they were justified in taking the opinion of the Court of Session, and considering that my Lord Gillies does appear to have entertained doubts, rather than actually dis-

April 14, 1826. sented from the decision pronounced by the other Judges, and considering that the Court of Session have already given the costs to the appellants out of the fund destined to those charitable purposes, perhaps your Lordships in this case may be induced to follow that course. But, my Lords, I think it right to state to your Lordships, that it ought not to be understood in Scotland, that because funds have been destined for charitable purposes, that therefore it shall be competent to the relations, although no doubt can be entertained with respect to the validity of such a disposition, if they choose to quarrel with that disposition, that it shall follow, as a matter of course, that they shall obtain a decision upon that question, not at their own expense, but at the expense of the fund, and thus diminish that fund which the party who has destined it for charities has intended should be so applied. In this case, however, I think your Lordships may without danger give the appellants their costs, for the reason I have stated, namely, that the question was considered by the Court below of such a nature as to be open to fair litigation on the part of the appellants, and therefore they gave costs; and as one of the learned Judges did entertain some doubt with respect to the decision the other learned Judges pronounced, perhaps your Lordships may be of opinion, that you may venture in this case to give the costs. I have thought it right, at the same time that I state this opinion to your Lordships, to throw out an intimation upon that part of the subject, to prevent it being supposed in Scotland that parties shall be permitted to raise a question of this nature where there can be no doubt on the validity of the disposition, at all events at the expense of the charitable fund. We must require, where such questions are litigated, that unless there be a fair question in the cause, they shall do it at their own expense, and not diminish that fund which the party had destined for charitable purposes. In this case, I feel it my duty to move your Lordships to affirm these interlocutors, but at the same time that the costs of the appellants should be paid out of the charitable fund. I therefore propose, with your Lordships' leave, that the amount of the costs should be made up so as to be introduced into the order of affirmance.

Appellants' Authorities.—Powell on Devises, p. 418. Stair, 125. 3 Erak. 1. 42. De Cond. ff. L. 52. 32. 68. 28. Voet. 5. 29. 1. Pothier on Test. 8. § 2. 2 Swinburne, 463. 1 Erak. 9. 8. Dick, Jan. 22, 1758, (7446.) 3 Erak. 9. 14. Campbell, July 26, 1752, (7440.) Dalziel, March 11, 1756, (16204.) M'Nair, May 18, 1791, (16201.) Balf. Pr. 420. 1633. c. 6. Ross, March 2, 1770, (14948.) Souter, Jan. (No. 2. Ap. Implied Will,) Saunders on Trusts, p. 210. Lovelass on Wills, p. 191. (Ed. 1823.) 9. Vesey, 404. 1. Swanson's Reports, p. 201. 7 Vesey, 51. (Note a.) 10 Vesey, 535. 6 Vesey, 194. 3 Marivale's Reports, 17. 1 Bridgeman's Index, 318. (2d Edit.) Brown's Reports, 517. 7 and 19 Vesey.

Respondents' Authorities.—3 Erak. 9. 14. Wharrie, July 16, 1760, (6599.) Brown's Trustees, Aug. 3, 1762. (2318.) Murray, Nov. 28, 1729, (4075.) Snodgrass, Dec. 16, 1806. (No. 1. Ap. Service.) M'Kenzie, Feb. 2, 1781, (6602.) 2 Roberts' Law of Wills, p. 454. M'Nair, May 18, 1791, (16210.) Campbell, June 26, 1752, (7441. 14703. 16203.) Hospital of Largo, July 1680, (14722.) Sholee, Jan. 1684. (672.)

King's College of Aberdeen, Feb. 23, 1741. (Elchies voce Trust, No. 11.) Coms. of Berwickshire, June 18, 1678, (1351.) Merchant Company of Edinburgh, Aug. 9, 1765, (5750.) Magistrates and Council of Stirling, July 6, 1774, (5755.) Campbell and M'Intyre, June 12, 1824. (3 Shaw and Dunlop, No. 93.) M'Kenzie's Observations, 1633, c. 6. Town of Edinburgh, July 12, 1694, (9107.) and Nov. 22, 1696. —Fountainhall.

April 25, 1826.

SPOTTISWOOD and ROBERTSON, JOHN THOMAS, Solicitors.

C. FERRIER and J. WHITE, Appellants.—*Adam—Robertson.*
J. BERRY and his Trustee, Respondents.—*Montague—Keay.*

No. 12.

Bankrupt—Stat. 54. Geo. III. c. 137—Sequestration.—Held (affirming the judgment of the Court of Session), 1. That an affidavit emitted in relation to a claim on a sequestrated estate, by a bankrupt under sequestration, and not by his trustee, is irregular; and, 2. That after a claim has been rejected, and no complaint made in due time, the party claiming has no right to object to a composition agreed to by the other creditors, but is only entitled to the composition so agreed to in the event of establishing that a debt is due to him.

April 25, 1826.

1ST DIVISION.

Mr BERRY, a merchant in Glasgow, having become bankrupt, his estate was sequestrated, and a trustee chosen. The mode of procedure directed by the statute 54 Geo. III. cap. 137, was followed out; and, at the usual period, the bankrupt, after making offer of a composition of 2s. per pound, amended it by offering 2s. 11d. per pound, payable at fifteen months, and guaranteed by a cautioner. This amended offer the creditors, at a meeting regularly called for the purpose, entertained as reasonable; and thereafter, at a meeting held in terms of the statute, unanimously accepted. A petition was then presented to the Court of Session, praying that the composition might be approved of, the sequestration declared to be at end, the trustee exonered, and the bankrupt discharged. Along with this petition the trustee lodged a report, stating that Berry had complied with the requisites of the statute, and a certificate, that the whole of the creditors who had claimed to be ranked, had, without exception, agreed to accept the offer of composition.

After intimation had been made in usual form, the case was put to the roll, when appearance was entered by Ferrier, trustee on the sequestrated estate of the Scotch Patent Cooperage Company, and by White, one of the partners thereof, who craved

April 25, 1826. and obtained leave to give in answers to the petition for exoneration and discharge.

Previous to his bankruptcy, Berry had been for some time trustee on the sequestrated estate of the Cooperage Company; and after he had managed the trust for some years, he resigned, and Ferrier succeeded him. Neither Ferrier nor White had lodged any claim, or made any appearance, during the proceedings leading to or terminating in the acceptance of the composition offered by Berry; but at this stage a claim was entered, accompanied by an affidavit, emitted not by Ferrier, but by White, who deponed, that 'the said John Berry is justly ad-'debted, resting, and owing to the individual sequestrated estate 'of the deponent, and to the sequestrated estates of the Scotch 'Patent Cooperage Company, and individual partners thereof, 'arising from acts of intromissions and omissions, the sum of '£18,288, 12s. besides interest; independent of which sum, 'from the malversation and misconduct of the said John Berry, 'as trustee foresaid, regarding the patent of the cooperage ma-'chinery, for which £2000 a-year was agreed to be paid, where-'by a loss has been sustained to the said sequestrated estates to 'that amount annually, for upwards of nine years, making in 'whole the sum of £18,000 sterling, besides interest.' This claim was rejected by the trustee and commissioners as vague and unsupported—no particulars being specified, and no vouchers referred to.

Thereafter, a new affidavit was taken by White, claiming the same sum, in the character and on the grounds above mentioned, but valuing and deducting a separate security for above £2700, which had been omitted in the first oath. With this a statement of the items of the claim was given, entitled, 'State 'of the claims at the instance of the Scotch Patent Cooperage 'Company, and individual partners thereof.' This claim, also, Berry's trustee and the commissioners rejected, on the ground that 'the statement is vague and unvouched, and appears on 'the face of it to be altogether fallacious.'

Against these judgments so rejecting these claims, neither Ferrier nor White complained. An action of count and reckoning was then raised by Ferrier against Berry, concluding for payment of what balance might appear to be due to him; and on failure to make due count and reckoning, then to pay the sum in the claim and affidavit.

Thereafter, the trustee, in making up a view of Berry's estate at one of the statutory periods, stated the claim to be inadmissible, and against this no complaint was made either by Ferrier

or White. In the meantime, they lodged answers to the peti- April 25, 1826.
tion for exoneration and discharge, and this being followed by replies and duplies, the Court approved of the composition, found Berry discharged of all his debts contracted prior to the date of the sequestration, except as to payment of the composition, and found Ferrier and White liable in the expense incurred in opposing the petition.

Ferrier and White having reclaimed, 'the Court, on the 4th 'February 1825, refused their petition, reserving to the said 'Charles Ferrier his right to a composition with the said John 'Berry's other creditors in the present sequestration, to such 'amount as he may be able to constitute in his action of compt 'and reckoning against the said John Berry, as former trustee 'on the Scotch Patent Cooperage Company's estates.' *

Lord President.—The main question here is, whether Ferrier is entitled to appear as a creditor in this sequestration. I am satisfied that he has no right to appear. Berry's conduct may have been loose, but I see no ground for imputing anything like fraud. Besides, his conduct as trustee was never complained of to the Court.

Lord Hermand.—I never saw such an attempt as is here made by Mr Ferrier. No oath has been taken by him, and he alone was the competent party to take it. We cannot admit this species of delegation in taking the oath. Such as it *is*, the oath is very extraordinary. I cannot conceive how any man could have ventured to take such an oath. Besides, the claim was rejected, and this was not complained of, and I think it was properly rejected.

Lord Gillies.—I rather think White was the party by whom the oath was to be emitted. But it is needless to enter upon that point, as the claim has been finally rejected, and therefore no vote in respect of it can be sustained.

Lord Craigie.—I am quite clear that Ferrier, as trustee, was the only party who could competently emit the affidavit. The opposition to this discharge has been very improperly maintained, and has been productive of much injury to the creditors, by depriving them in the meanwhile of their composition, and it has imposed a grievous hardship on the bankrupt.

Lord Balgray.—I am also of opinion that the oath is quite irregular. White was not the proper party to emit it. If Mr Ferrier could not take an oath of verity, why did he not take

* See 3 Shaw and Dunlop, No. 169.

April 25, 1826. one of credulity, if he thought there was any foundation for the claim? But, independent of this, the claim has been finally and properly rejected. Ferrier has therefore no title to oppose the discharge. But this discharge will, of course, not have the effect to deprive him of the right to draw a composition corresponding to any debt which he may succeed in establishing.

Ferrier and White appealed.

Appellants.—The Court, unless with the concurrence of nine-tenths of the creditors in number and value, had no power to discharge Berry on payment of a composition. But, adding the appellants' claim to the claims ranked, the concurrence amounted to little more than a half. In support of their claims, the appellants produced the books of the Cooperage Company; and if other documents are awanting, that is the fault of Berry himself, who, while acting as trustee, neglected to make up the requisite inventories, valuations, &c. Besides, where a claimant has not in his power to produce written documents, an oath of verity, and a signed copy of the account claimed, is statutory evidence to the effect of affording a qualification to vote. It was time enough to object when the Court took up the consideration of the trustee's report. The trustee did not, in making up a scheme of ranking and division, reject the appellants' claim, for no such scheme was made up, or dividend declared; and, under the statute, it was unnecessary to complain by petition. It was not imperatively necessary for Ferrier to take the oath. The conduct of Berry himself, rendered it indispensable for White to make the affidavit of verity. Besides, his conduct, both as an individual and trustee, has been so culpable, and marked by such a dereliction of duty, as not to entitle him to a discharge on payment of a composition. It is unwarranted by law and statute, to discharge a judicial trustee upon payment of a composition on his intromissions with the funds of the estate committed to his charge.

Respondents.—The claim is utterly vague, and unsupported by evidence. It resolves into an unliquidated claim for damages, and, in hoc statu, cannot stand in the way of the approval of the composition and discharge. If a sum should be decerned for in the count and reckoning, the appellants will receive their composition, in terms of the reservation in the judgments. Besides, the appellants have not qualified themselves as creditors in the manner required by the statute. Ferrier ought to have taken the oath, and not White, who is not a creditor of Berry.

But even if the claim had been good, it was not brought forward tempestive; and, at all events, its rejection ought to have been complained of by a petition to the Court. April 25, 1826.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £200 costs.

LORD GIFFORD.—My Lords, there was a case heard in the course of last week, of Ferrier against Berry, in which an appeal was brought to your Lordships against certain interlocutors of the Court of Session; by which interlocutors the Court of Session approved of the composition offered and agreed to, in terms of the bankrupt law; declared, that all proceedings in the sequestration should cease; exonered the trustee of his intromissions; ordained his bond of caution to be given up; found Mr Berry discharged of all debts contracted prior to the date of the sequestration, except as to payment of the composition in terms of the bond, and found the appellants liable in the expense incurred. I will not detain your Lordships, by going at any length into this case, but will only state, that the respondent Mr Berry, having become a bankrupt under the 59th sect. of the statute, to which I have alluded, (54 Geo. III. c. 137,) made a proposition to his creditors, of a composition of 2s. 11d. in the pound. It appears that he had originally proposed a less sum; but at a regular meeting convened under that section, a proposition of 2s. 11d. per pound was made, and was approved of by nine-tenths of the creditors; indeed by all the creditors who were present; and it appears that in pursuance of that section of that statute, Mr Berry petitioned the Court of Session, stating the proposition he had thus made, and praying that the Court of Session would approve of this composition, in terms of the statute.

My Lords, it appears, that Mr Berry had, himself, some years before, been a trustee under a sequestration issued against the property of the Scotch Patent Cooperage Company. Having become trustee in the year 1816, he resigned the office in 1820, and Mr Ferrier, the appellant, became trustee in his stead. It appears, that from the year 1820 to the year 1822, Mr Berry continued to carry on business, when, as I have already stated to your Lordships, he became a bankrupt. No proceedings whatever took place under the sequestration against the Scotch Patent Cooperage Company, to call Mr Berry to account for his intromissions, or his conduct as a trustee. Mr Ferrier, the appellant, who was at that time the trustee, did not take any part at the meeting, which I have stated to have been regularly held at the time the composition was accepted, but on the 1st June 1822, when the Court was about to be moved to approve of the composition and grant a discharge, a claim was lodged with the trustee, together with an oath of verity, in the name of one of the appellants, Mr White, styling himself 'late one of the partners of the Scotch 'Patent Cooperage Company,' which stated a debt to be due to that Company from the respondent Mr Berry, in respect of his intromissions

April 25, 1826. and malversations as trustee for the Cooperage Company, amounting to £31,288, 12s. 5d. This was not claimed as for a debt due from Mr Berry in respect of any specific transaction in business, but it was claimed generally, for his intromissions and malversations as trustee under that sequestration—that amount of loss being alleged to have been sustained by his negligence as trustee. It appears that a meeting of the trustee and commissioners was held to take this claim into their consideration, and that they rejected the claim. A second claim was then made, making a deduction of £2700 from the first claim. That claim was also rejected. No petition was preferred to the Court of Session quarrelling with the decision of the trustee and commissioners, but still Mr Ferrier contended, that having this claim against Mr Berry's estate, he was entitled to oppose this composition before the Court of Session, as being (in consequence of his being trustee of this sequestrated estate of the Scotch Patent Cooperage Company) a creditor who had a claim to this amount against Mr Berry.

It will be necessary for me to state to your Lordships the 59th clause of the statute 54th George III. It enacts, 'That in case at the meeting held 'immediately after the second examination of the bankrupt, or at any subsequent meeting, called by the trustee with consent of a majority of the 'commissioners, the bankrupt or his friends shall make a proposal of composition to the creditors, and shall offer caution to the satisfaction of nine-'tenths of them, both in number and value, assembled at the said meeting 'for such composition upon his whole debts, as the said nine-tenths in 'number and value, so assembled, shall think just and reasonable, the trustee shall appoint another meeting, &c.; and if at the meeting so appointed, it shall be the opinion of nine-tenths of the creditors there assembled, 'both in number and value, that the offer should be accepted of, a report 'of the proceedings relative thereto, shall be forthwith made up by the 'trustee, and transmitted to the clerk of the sequestration in the Court 'of Session for the approbation of the Court; and if the Court, upon considering said report, and hearing any objections that may be stated by 'opposing creditors, shall find the proposition reasonable, and that the same 'has been assented to, not only by nine-tenths in number and value of 'the creditors who attended by themselves, or others authorised by them, 'at the meeting last mentioned, but by nine-tenths of all the creditors who 'have produced grounds of debt, or interests, or oaths of verity, an act or 'order shall be pronounced to that effect, and the bond of caution which 'must be previously lodged in the clerk's hands, shall then be given up 'to the trustee for behoof of the creditors, the whole expense attending 'the sequestration being at the same time paid or provided for, to the 'satisfaction of the Court, by the bankrupt or his friends, after which all 'proceedings in the sequestration shall cease, and the said act or order 'shall declare the trustee exonered, and the bankrupt discharged, except 'as to the payment of the composition.'

Now, my Lords, there is no doubt in this case that the composition had been approved of by the nine-tenths of the creditors who were pre-

sent at the meeting, which had been convened in pursuance of this section of the statute. It appears, that there were creditors to the amount of £50,000 approving of the composition; but it is to be observed, it is not only necessary that nine-tenths of the creditors should approve of the composition, but that the Court of Session should be satisfied that creditors to the amount of nine-tenths had concurred, whether creditors to the amount of nine-tenths had been present at the meeting or not. The question, therefore, in this case before the Court of Session, was, whether, under the circumstances, was this creditor within the meaning of this enactment; did the appellant show grounds for establishing such an interest as entitled him to oppose this composition? Now, my Lords, the Court of Session were of opinion, upon the result of the discussion before them, that this gentleman did not come within this section. They were of opinion, that this claim, on the part of Mr White, was properly dismissed, and they were of opinion, from the nature of the demand in this case, that Mr Ferrier was not entitled to oppose this composition. April 25, 1826.

My Lords, the 53d section, which relates to the oath of verity, enacts, 'that in every such oath, the creditor deponing shall specify every security he holds for his debt, whether on the estate of the debtor or other obligants, and shall swear that he holds no other security than is mentioned in his oath, otherwise his oath shall not be received by the trustee as sufficient, nor his claim be sustained; and the oaths of verity upon debts required by this act may be taken before any Judge Ordinary, or Justice of the Peace; and, where any creditor is out of the kingdom of Great Britain and Ireland, or is under age, or incapable to give an oath, in all such cases, an oath of credulity by the agent, factor, guardian, or other manager, taken in the same manner, shall be sufficient.' Now, my Lords, in this case, the oath was taken, not by Mr Ferrier the trustee, not by any person describing himself as the agent of Mr Ferrier, but by one of the bankrupt partners; and the majority of the Court of Session say, that that was not sufficient. My Lords, it does appear to me, after the greatest attention to that which has been advanced at your Lordships' bar in this case, that the judgment in the Court of Session was perfectly right; and under all the circumstances of the case, considering that the composition had been accepted by creditors to so great an amount, that the claim of this gentleman, Mr White, had been twice rejected, and that there had been a formal application to the Court of Session, the appellant ought not lightly to have appealed from it. It does appear to me, that he is not a creditor within the language of the 53d section, who has produced grounds of debt, or interest, or oath of verity, to entitle him to oppose this composition.

My Lords, it was further urged at your Lordships' bar, that, even if it were not so, the Court of Session had not exercised a wise discretion in allowing the composition. It is urged at very great length, in these papers, that Mr Berry had misconducted himself most grossly as a trustee under the sequestration against the effects of the Cooperage Company. My Lords, with respect to his conduct as a trustee, no regular complaint

April 25, 1826. appears to have been made against him upon that ground, even during the whole time he continued trustee. But the question in the Court of Session was, whether, under the circumstances of the case, the proposition made by the bankrupt, with the approbation of his friends, was a reasonable proposition, and whether the composition was a reasonable composition. There certainly is nothing presented to your Lordships, upon which you can infer that this was not a reasonable proposition. Under these circumstances, I see no ground whatever for impeaching the decision of the Court of Session; and when your Lordships recollect that this is a case under the bankrupt laws against an individual whose proposition has been approved of by nine-tenths of his creditors, and having been brought before the Court of Session, has been approved of by them, though I think your Lordships will be of opinion, that it is most salutary and useful that your Lordships should possess the jurisdiction of reviewing the decisions of the Court of Session, I apprehend your Lordships will think, whenever such a case is brought before you (unless it be satisfactorily made out on the part of the appellant that the composition offered by the bankrupt is unreasonable), those who have entered into a litigation, and who are not contented with the decision of the Court of Session, but bring the bankrupt, without just cause, to your Lordships' bar, shall not put that bankrupt to expense, but that the appeal shall be dismissed, with costs to be paid by the appellant. I shall therefore humbly move your Lordships, that this judgment be affirmed, with £200 costs.

Appellants' Authorities.—54th Geo. III. c. 137.—2 Bell's Com. 378. 495.—Act of Sed. 14 Dec. 1805, § 15.—Fraser *v.* his Creditors, 5th April 1786 (11793).—4 Ersk. 3. 27.—1 Bell's Com. 464.

Respondents' Authorities.—2 Bell's Com. 360. 376. 494.—vol. i. 565.—Ronald M'Nicol, 1821.

RICHARDSON & CONNELL—MONCRIEFF & WEBSTER—Solicitors.

W. TAYLOR, Appellant.—*Brougham—Shaw.* SIR W. C. FAIRLIE, and G. TAYLOR, Respondents.—*Keay—Abercromby.*

No. 13.

1. *Landlord and Tenant.*—A lease having been granted to three tenants, excluding assignees, and two of the tenants having, without consent of the landlord, assigned their interests to the other tenant, who obtained possession, and was thereafter deprived of it: Held (affirming the judgment of the Court of Session), that he was not entitled to maintain an action against the landlord demanding re-possession, as being the only person entitled to possession.
2. *Appeal.*—Respondents, in an appeal, having failed to lodge answers to the petition of appeal, and also their Cases, in due time; and the cause being appointed for hearing ex parte, not entitled to be heard at the bar; but the case delayed on their paying the costs of the day.

May 5, 1826.
1ST DIVISION.
Lord Medwyn.

IN 1812, Sir W. Cunningham Fairlie, proprietor of the estate of Fairlie, let to 'John Taylor, Esq. of Blackhouse, William 'Taylor, Esq. Member of Parliament, and George Taylor, Esq. 'residing at Ayr, and their heirs; but secluding assignees and 'subtenants, under whatever denomination, legal or voluntary, 'without the concurrence of the proprietor in writing,' the coal in the lands of Fairlie, 'for the whole time and space of twenty-'four years, and during the lifetime of the said George Taylor, 'should he survive the said period of twenty-four years, and 'commencing from and after the term of Martinmas next 1812.' By another lease granted in the same year, Sir William let to the same parties the farm of Peatland for the same period, and under the same conditions. In 1814, an arrangement was entered into between the three tenants, who were brothers, by which, after narrating the terms of a submission which was then in dependance, and that they had 'agreed to sell and make over to 'the said William Taylor, and his heirs and assignees, our in-'terest in the tacks before-mentioned, and as more particularly 'herein after assigned; and seeing the said William Taylor 'has granted bills to us, for the value of the stock and machi-'nery after-mentioned, in terms of the foresaid agreement, 'therefore, in part implement of the said agreement, we have 'made and constituted, as we do hereby make and constitute, 'the said William Taylor, his heirs, and donators, our lawful 'cessioners and assignees, in and to our two third parts or shares 'in the two tacks in part before narrated, during the whole 'years and terms thereof, to run from and after the term of 'Martinmas 1813, as to the said farm of Peatland, and the first 'day of June 1814, as to the coal; and to all the clauses and 'obligements contained in the foresaid two tacks, profits, and

May 5, 1826. 'emoluments which may arise therefrom, and to all action and 'execution competent to us thereupon, with power to the said 'William Taylor and his foresaids, to occupy the said lands and 'others as after-mentioned.' On the other hand, William Taylor bound himself to free and relieve them of the rents payable to the landlord, and to pay the sums specified in the bills. By virtue of the assignation, he obtained the exclusive possession of the coal and farm; but it was not intimated nor consented to by the landlord. In 1818, William Taylor became insolvent, and conveyed his estates, including the above leases, to trustees for behoof of his creditors. The trustees took possession; but in April 1818, they gave notice that they were to abandon the subjects on the 15th May thereafter. Immediately thereafter, William Taylor went to Ireland, and he alleged that he had caused his overseer to enter to the possession of the premises on his behalf. During his absence, John and George Taylor presented a petition to the Sheriff of Ayrshire, stating the threatened abandonment by the trustees, the absence of William Taylor, and the interest which they had in the subjects, in consequence of their liability for the rents, and praying the Sheriff to authorise them 'to carry on said collieries, and set the lands, repair 'the houses and fences, and to do everything for the interest of 'all parties, and to keep proper accounts.' The Sheriff at first granted the prayer, 'quoad the care of the subjects in dispute,' and thereafter, on the motion of the petitioners, granted warrant for the inspection of the premises by persons of skill. No farther step was taken in this process; and William Taylor, on his return from Ireland in the month of August, presented a petition to the Sheriff, praying him to 'ordain the said John and 'George Taylors immediately to cede and give up the possession of the said colliery and pertinents to the petitioner, the only person entitled to the possession thereof. Answers were lodged to this petition; but in the meanwhile the estates of William Taylor were sequestrated under the bankrupt act; and no farther proceedings occurred in this action. Thereafter yearly, in 1825, and while the legality of the sequestration was depending on appeal, the landlord advertised that the coal and farm were to be let to a new tenant; William Taylor then presented a new petition to the Sheriff, founded on the leases and the assignation granted by his brothers, (one of whom, John, had in the meanwhile died,) and he prayed the Sheriff 'to ordain the said George 'Taylor, and the said John Taylor, heir of the said deceased 'John Taylor, if still in possession of the said colliery, or the 'said Sir William Cunninghame Fairlie, if he be in possession

'thereof, immediately to cede and give up the possession of the May 5, 1826.
'said colliery of Fairlie and pertinents thereof, and farm of Peat-
'land and pertinents thereof, to the petitioner, the only person
'entitled to the possession of the same.' In defence, it was stated by Sir William Cunninghame Fairlie, that he had conveyed his estates to trustees, and had gone to reside in England more than forty days prior to the execution of the petition against him, and therefore he was not subject to the jurisdiction of the Sheriff, and besides that, he had not consented to the assignation. On the part of George Taylor it was maintained, that as the estates of William Taylor were under sequestration, he had no title to pursue; that the warrant granted by the Sheriff in 1818, was a lawful title of possession; and that, at all events, William Taylor could not obtain possession, without first paying the arrears of rent, and finding security for the rents to fall due in future. The Sheriff found it 'admitted, that the pursuer's estate
'was sequestrated by the Court, and that the competence there-
'of is at present depending on an appeal to the House of Lords;
'that by the tack granted by Sir William Cunninghame Fairlie
'to the pursuer, and John and George Taylor, of the coal-
'work and lands, the proprietor secluded assignees and sub-
'tenants, under whatever denomination, legal or voluntary,
'without the concurrence of the proprietor in writing; that from
'the nature of the assignation granted by the defender, George
'Taylor, and his deceased brother, John Taylor, of their two-
'thirds of said tack, he, the pursuer, bound and obliged himself
'to make payment to the proprietor of the whole rents or tack-
'duties stipulated by the several tacks therein mentioned, and
'also to perform, implement, and fulfil the whole other obliga-
'tions and prestations incumbent upon the tacksman, and that
'yearly, during the tack; and therefore, under the present cir-
'cumstances of the whole case, sustained the defences, and as-
'soilzied the defenders from this process.' William Taylor then presented a bill of advocation, which the Lord Ordinary refused,
'in respect that the bill is offered without caution and separa-
'tim; in respect that the complainer can have no right to claim
'possession exclusive of the other lessees, except in virtue of an
'assignation, which their title expressly debars, and which the
'proprietor objects to; and farther, that the coal lessees are not
'bound to yield the possession to a bankrupt whose estate is se-
'questrated, and whose trustee does not concur in the applica-
'tion, unless he find caution for the obligations incumbent by
'them to the landlord, which he does not offer to find.' A second bill having been presented, offering caution for the ex-

May 5, 1826. penses of process, and for payment of the arrears of rent which should be ascertained to be due, and which should thereafter become due, the Lord Ordinary ordered Cases to the Court, who adhered to the interlocutor, and thereafter, on the 11th February 1826, refused a reclaiming note.*

Lord President.—We cannot compel the landlord to take any one as an assignee. The advocator claims possession from him in that character. It is impossible to grant his prayer.

Lord Balgray.—There is some difficulty from the advocator being a joint tenant, and holding an assignation from the other tenants. I rather think, however, that he cannot found on it as a title of possession against the landlord. The case may be different as to the other tenants; but I apprehend, that all the advocator can claim from them is damages for non-implement of the assignation.

Lord Craigie.—From my acquaintance with some of the actions between these parties, I know that the landlord never recognised this person as an assignee.

Lord Gillies.—There are peculiar circumstances attending this case, which present some difficulties; but I rather think the interlocutor right.

William Taylor appealed.

Appellant.—As the trustee on the appellant's sequestrated estate has abandoned all claim to the leases, and as the appellant has found caution for the expenses of process, he is entitled to prosecute this action, notwithstanding that his estates are under sequestration.† By virtue of the leases, he has, in a question with the landlord, a right to exclude him from possession; and by virtue of the assignation granted by the co-tenants, he has a similar right as to them, and is entitled at all events to draw the profits and emoluments corresponding to their shares. He obtained possession under each of these titles respectively, and he remains undivested,—the conveyance to the trustees being merely to them as managers, and the nature of the leases preventing the

* See 4 Shaw and Dunlop, No. 299.

† The case was appointed to be heard ex parte, as the respondents had not lodged their answers to the petition of appeal, nor put in their Cases in terms of the standing order of the 12th July 1811. Appearance was, however, made by the respondents at the bar, when the appellant objected, that they had no right to be heard. The respondents having, however, stated that they had presented a petition to the committee on appeals, to be allowed to give in their Cases, Lord Gifford moved, and the House ordered, that the hearing be adjourned, but that the respondents should pay the costs of the day.

judicial trustee acquiring any right to them. The warrant of the Sheriff in favour of John and George Taylor was illegal, because the application to him was truly to appoint judicial factors, which he had no jurisdiction to do; and besides, it was limited to the period of the appellant's absence, and the warrant never became final, as it was kept open by subsequent proceedings. Seeing, therefore, that the appellant had a written title, and was in actual possession, he thereby acquired a real right, of which he could not be deprived, except by the decree of a competent Court. If the assignation were objectionable, it could only be declared so judicially, and the circumstance of its being liable to objection, could not entitle the landlord to take possession at his own hand, in opposition to the real right vested in the respondent. The defence of the landlord, that he was not liable to the jurisdiction of the Sheriff, was unfounded, and at all events, judgment had been pronounced on the merits, which implied that the objection had been repelled, and no appeal had been brought by the landlord. The appellant was therefore entitled to call him into Court, and to demand possession from him as well as from the co-tenants. May 5, 1826.

Lord Gifford.—But look at the nature of your petition to the Sheriff, in which you found upon the assignation, notwithstanding the exclusion of assignees in the leases; and you there pray to have it found, that you are the 'only person entitled to the 'possession of the same.'

Appellant.—In the petition, the leases granted by the landlord are also founded upon, and the assignation merely relates to the question with the co-tenants. By virtue of these leases, the appellant has, in reference to the landlord, an exclusive right of possession, and as the landlord insists for payment of the whole rents from the appellant, he is entitled to the entire possession. No objection was taken in the Court below to the form of the prayer, and the judgments are placed on different grounds.

Respondents.—It may be admitted that the appellant has a title to pursue this action, as he has found caution for expenses, and the trustee does not claim. But the landlord was not subject to the jurisdiction of the Sheriff, and therefore cannot be affected by any judgment pronounced by him. Besides, the title which he granted to the appellant and his brothers was qualified with the express condition that assignees should be ex-

May 11, 1826. getting the note discounted, and he stated, that 'It occurred to 'me as the only way in which the matter could, just at present, 'be managed, was to draw on you at one month's date, which 'Edgars and Lyon accordingly did this day for £236, 7s.; and 'I now inclose bank-notes for the proceeds, being £235 ster-'ling. By the time the draft on you falls due, we will be able 'to discount your bill, as by the middle of next month, we, our-'selves, will be easier. In the meantime I return it to you, 'and will be ready to discount either it or your own bill within 'three months, so as to remit you the proceeds in time to pay 'our draft on you, which of course you will accept when it is 'presented. When you send your bill for discount, it would 'answer better if made payable in Edinburgh than Glasgow, as 'the banks prefer Edinburgh to Glasgow bills.'

The proceeds of the draft thus sent by Edgar were applied in payment of the bill by Robinson and Ainslie to Mason. This draft fell due on the 10th-13th June, and to provide for it, Ainslie, on the 9th, re-transmitted to Edgar, the promissory-note by Ainslie and Robinson, payable in Glasgow to Edgar and Lyon. This bill Edgar discounted, and forwarded the proceeds to Edinburgh, and Ainslie took up the one month's draft.

The promissory-note of Robinson and Ainslie was payable on the 5th August, and Anslie wrote to Edgar on the 1st:—'The 'bill per Mr George Robinson and me, which you were so good 'as discount for me (£235), payable at your office, I observe is 'due on 2d-5th August current. As from your correspondence 'then, it did not seem of consequence to you when it was pay-'able, I have been counting on your allowing it to remain over 'for a little while, cash being in the market very scarce at pre-'sent, which has prevented me from being conveniently in cash 'at this time to take it up. This, I trust, it may be convenient 'for you to do, and you will oblige me much if you will do so. 'This you will receive upon 2d (to-morrow), and your writing 'me in course that you can manage the matter in this way for 'me, I shall take kind.'

Edgar immediately answered, that it would not then suit to advance the money for the bill; but stated that 'we now draw 'upon you for the amount of your bill, including the discount 'on the last and present bills, and the stamp, and will thank 'you to return the enclosed draft in course of post, which may 'prevent our being put in actual advance, provided we can get it 'on Monday forenoon. That it may be the more convenient for 'you, we have drawn the inclosed at some days more than three 'months, and it will not fall due till Martinmas. We will take

'care of the bill on Monday, but trust to receiving the inclosed May 11, 1826.
'to refund us on Tuesday.'

Ainslie accepted this draft, and on the 4th of August returned it to Edgar, saying,—'I have this day yours of 3d current, and 'now return you the bill you have drawn on me for £240, 7s. 'accepted payable 11th-14th of November. I am extremely 'obliged by your at present thus managing the matter. I do 'not wish you to return me the bill you already have, accepted 'by both Mr Robinson and me. Let it remain in your hands 'for the present, and until we settle the debt afterwards; you 'may therefore take it up not on a discharge of it, but per indor-'sation. I'll see you ere long at Glasgow; and in the meantime 'you can write me a few lines mentioning your having received 'this bill; but that you, in the meantime, retain also the other 'bill till the debt is paid.'

Edgar discounted the acceptance, and with the proceeds retired the promissory-note of Robinson and Ainslie, and took it up in the way suggested. He then wrote to Ainslie:—'I was yes-'terday favoured with your letter of the 4th current, covering 'your acceptance to Edgars and Lyon, due 11th-14th Novem-'ber, for £240, 7s. We have taken care of your and Mr Ro-'binson's bill for £235, due yesterday, and will hold it till we 'have the pleasure of seeing you here.'

When Ainslie's acceptance fell due, he again wrote to Edgar on the 19th October 1816. 'As Martinmas returns, we begin 'to think of our obligations, and your and my bill for my ac-'commodation has not failed to recur. But as the principal 'way that lairds have of discharging debts is by contracting 'corresponding loans, and as I have not succeeded in laying my 'hands on a similar sum, so I must beg the favour to continue 'matters as they are for a little longer. I hope you will find 'no inconvenience in so managing the matter for me; and I 'write you thus early about it on that account.' Mr Edgar, on the 25th, wrote in answer,—'We will endeavour to arrange 'matters in the same way as formerly, by discounting your bill 'in the Royal Bank, and remitting you the proceeds; and now 'enclose a draft on you, 4th October, at four months' date, '£240, which I will thank you to accept, and return to me so 'as to be here about the 1st or 2d of next month; and I will 'take care to get it discounted, so as to be in time for the bill 'you have to pay on the 11th-14th November, and will either 'pay you the money when you are here, or remit it to you in 'Edinburgh.' Ainslie accordingly accepted and returned the four months' draft for £240, which being discounted by Edgar,

May 11, 1826. the proceeds were remitted to Edinburgh, and with these proceeds Ainslie retired his acceptance.

Again, on the 10th May 1817, Ainslie wrote to Edgar from Edinburgh:—'To prevent mistakes about this, I have to mention, that the purpose of your remitting this money is to retire my acceptance to you for payment for £243, 6s., payable at the Royal Bank here; and which was one of a series of bills, by which, one after another, we raised money, so as to have a fund to replace that originally employed in retiring a bill, in which Mr G. Robinson had joined me, to James Mason in Berwickshire, per £235, 12s., dated 10th November 1815.'

This kind of traffic continued until 1818; and shortly afterwards, Ainslie became so embarrassed as to oblige him to place his affairs in the hands of a trustee; and of this he gave intimation to Edgar.

Being unable to obtain payment, Edgars and Lyon raised an action against Ainslie and Robinson for payment of their promissory-note for £235. Ainslie made no appearance, but Robinson gave in defences; and the Lord Ordinary, after some procedure, decerned in terms of the libel, and afterwards found expenses due. Robinson having presented a petition against this judgment, which was appointed to be answered, the Court, on the 26th of May 1824, adhered.

Lord Craigie.—The interlocutor is quite right. The promissory-note by Ainslie and Robinson was granted with the view to retire a joint obligation, in which Robinson was as effectually bound as Ainslie was. There was no giving of time, in the proper sense of the word, or which can afford any defence to Robinson.

Lord Glenlee.—The promissory-note was transmitted by Ainslie to Edgars and Lyon on the 4th of August 1816, on returning the draft which had been made upon him, so as to raise money for payment of the original debt, and he desired them to keep the promissory-note till the debt was paid. Matters appear afterwards to assume somewhat of a complicated character, but if they remained on the same footing as at first, I am at a loss to see how the obligation of Robinson has been taken away. I rather think that they did so, and that Edgars and Lyon have just made an advance in liquidation of the original debt for which Robinson was bound. In security of their relief for this advance they received the promissory-note, and they are entitled to avail themselves of it.

Lord Justice-Clerk.—There are no legal grounds for disturbing the interlocutor. There has been no giving of time in reference

to the acceptor, which in such a case as this is not relevant. If Robinson had been able to show that the promissory-note which he had granted had been extinguished, the case would have been very different, but he has not done so. May 11, 1826.

Lord Robertson.—The answers are quite satisfactory. Robinson was jointly bound with Ainslie for a debt of £235. A promissory-note was then granted, with the view of raising money for both; and this was put into the hands of Edgars and Lyon. But even if Robinson had not been liable for the original debt, this would not have affected a bona fide holder of the promissory-note. There is no evidence that it was ever retired.

Robinson again reclaimed, but the Court, on advising his petition with answers, adhered on the 8th of February 1825, 'reserving to the petitioner his claim of deduction for and in 'respect of any dividend received by the respondents from Mr 'Ainslie's estate and effects.'*

Lord Glenlee.—It will be observed, that Ainslie desired Edgar and Lyon to take up the promissory-note 'per indorsation.' This is no doubt somewhat ambiguous, as perhaps Ainslie might have wished to have had it indorsed to himself. The language of Edgars and Lyon is also equally ambiguous, for they say to Ainslie that 'we will hold it till we see you.' If, however, the note was taken up by indorsation to Edgars and Lyon themselves, which I take to be the fact, the case is different from what it would have been if it had been taken up and indorsed to Ainslie, as that would have extinguished the bill. There is, however, no allegation to that effect, and I am afraid we must adhere.

Lord Robertson.—The note was put into the hands of Edgars and Lyon as a security, and no arrangement between Robinson and Ainslie could affect them. A difficulty, however, arises from their having returned the note to Ainslie, and it may be doubted whether Ainslie had any authority to retransmit the note to them. That, however, is a question properly between Ainslie and Robinson.

Lord Pitmilly.—My opinion remains the same as when I pronounced the judgment complained of. I agree with Lord Robinson that Edgars and Lyon have nothing to do with any question between Ainslie and Robinson. The latter trusted Ainslie with the note, in order to retire one for which they were jointly bound, and he must suffer the consequences. Edgars and Lyon are bona fide holders. There is no room for the plea of novation.

---

* See 3 Shaw and Dunlop, No. 355.

May 11, 1826. *Lord Alloway.*—I am of the same opinion. The note was sent by Ainslie to Edgars and Lyon expressly for the purpose of being held in security of the advance which they might make for the liquidation of the original debt. The subsequent transactions which took place were merely expedients to prevent Edgars and Lyon being in actual advance. The note was, in point of fact, never paid by Ainslie or Robinson, and there has been no novation.

Robinson appealed; and he having died, the appeal was revived in the name of his son, William Rose Robinson, Esq.

Appellant.—The respondents gave no value for the promissory-note. It was transmitted to them to be discounted that the proceeds might go to extinguish the bill due to Mason. This mode of raising the money was not adopted by the respondents, who preferred discounting a bill drawn on Ainslie alone, and with the proceeds of which the bill to Mason was extinguished, so that the promissory-note now became inoperative, and the appellant released. It was a breach of trust in the respondents to discount the promissory-note after the purpose of its being granted had been satisfied. On its retransmission, the respondents gave no value for it. It was discounted by the bank, and was retired and extinguished by funds supplied for that purpose by Ainslie, the proper debtor, and its obligatory force then expired. The respondents could not hold the promissory-note as a security for future contractions by Ainslie, especially for the sum finally due them. If it could be considered as a security for anything, it could only be for the first draft on Ainslie. But that draft had been paid, and consequently the security lapsed. It was plain to the respondents that the appellant was a mere surety, lending his name for the accommodation of the proper debtor. It is evident from the correspondence that the appellant was dropped out of the transaction altogether. The obligation had fallen by novation, and the respondents lost their right of action against the appellant, by having given time to Ainslie, without the appellant's consent.

Respondents.—Edgars and Lyon are onerous holders of, and gave full value for the promissory-note; and if that be disputed, the onus probandi lies on the appellant. They have no concern with the conduct of Ainslie to the appellant. The parties appear as principal obligants on the note, and it is jus tertii to the respondents, whether the appellant was or was not a mere surety. They cannot be affected by alleged latent objections, or

be accountable for the application of the proceeds of the note. In point of fact, these proceeds went to extinguish a debt due by the appellant and Ainslie. The respondents held the note in their possession as a valid and subsisting debt against the co-obligants. The appellant has mistaken the law of recourse, even if the doctrine were, as it is not, applicable; he is not a drawer or indorser, but a joint acceptor of a bill in their favour. Novation is not to be presumed; and there was neither novation nor release. The note was not paid by funds supplied by Ainslie, but by the respondents out of their own pocket. May 11, 1826.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, but without costs.

LORD GIFFORD.—My Lords, in this case the principal question undoubtedly is that which has been argued at your Lordships' bar by the Counsel, namely, In what situation Mr Robinson, the appellant, stood with respect to this bill between him and the respondents, Messrs Edgars and Lyon? If, as between himself and Edgars and Lyon he was a co-principal with Ainslie, then I apprehend little doubt can be entertained of the correctness of the judgment which has been pronounced below, because then he was a principal debtor. The question therefore is, whether there is anything in this case to prevent their recovering against Robinson? Now, my Lords, with respect to the situation in which Robinson stood, there is no doubt that he had, in connexion with Mr Ainslie, become liable at least to a Mr Mason for a sum of £235. It is contended on the part of the appellant, that at this time Mr Robinson was only a surety for the debt of Ainslie, but it is quite clear that they were both jointly liable on the security given by them to Mr Mason.

My Lords, that debt not having been paid, but the bill given to Mr Mason being nearly due, Mr Ainslie considered how money was to be raised in order to discharge that debt to Mason, to which, whether Robinson was a principal or a surety, he was jointly liable, at all events, and they had recourse to this contrivance:—A joint promissory-note was drawn by Robinson and Ainslie, payable, as I understand, upon the face of it, to Messrs Edgars and Lyon. Ainslie, in whose hands this note was, then wrote a letter of the 9th of January 1816, to Mr Edgar, in which he states this: 'The purpose of my writing you is to mention, that, like 'other lairds, having a little debt, a sum of between £200 and £300, for 'which my friend and late partner, Mr George Robinson of Clermiston, 'is bound along with me, is called up, and payable about the 8th or 10th 'of next month. The quarter from whence I expected to have got cash 'to pay this sum, I have been disappointed in here, and it has just occurred 'to me, that probably you or Mr James might, from your floating capital, oblige me, by letting us have that sum on our obligation, which might 'either be a bond, or, if wanted sooner, the temporary document of a bill 'might be adopted, signed by Mr Robinson and me jointly.'

May 14, 1828. My Lords, after that, a note was drawn, dated the 10th of February 1816, payable in three months, for £235, 12s. That note was transmitted by Mr Ainslie to Edgar, in order to have it discounted, for the purpose of raising money to discharge the debt due to Mason. Mr Edgar thought that the better way of raising the money would be, (there being a difficulty in discounting this promissory-note,) that Messrs Edgars and Lyon should draw a bill of exchange on Mr Ainslie, that bill to be accepted by Ainslie, and discounted, and the money applied to the payment of the debt of Mason. In that way the money was raised, and the debt due to Mason paid. The promissory-note by the appellants to Mason was returned in the first instance, by Messrs Edgars and Lyon, they stating that they could not discount it; but it was afterwards returned again to them, and in their hands it remained. The money raised upon the first bill of exchange not having been advanced by them when that bill became nearly due, it was renewed by another bill, and so it went on by several renewals till November 1818, when, Mr Ainslie falling into difficulties, they could no longer raise the money in this way, and Edgars and Lyon were finally obliged to raise the money to retire the bill which had been accepted by Ainslie.

During the whole of this transaction, my Lords, I must confess, (though I do not say that the case is without difficulty as to the relation in which Robinson stood, but considering the situation in which he stood upon this promissory-note, as between him and Ainslie on the one hand, and Messrs Edgars and Lyon on the other,) I cannot say that there has been any mistake. It has been argued, that if Robinson was a mere security to Mason, he ought also to be considered a security to Edgars and Lyon; but if he was a mere security, having been jointly liable upon that note, the money having been advanced to Ainslie to relieve him from the joint liability they had incurred to Mason, it appears to me that Messrs Edgars and Lyon were not bound to consider whether Robinson was a security to Mason or not. They were desired to raise a sum of money to relieve this joint responsibility; and whether Robinson stood in relation to that person as a principal, or a security, does not appear to me to be material. The contract, it is stated, proceeded on the foundation that he was a surety to Mason; but it appears to me that it is difficult to say that that was the precise situation in which he stood. It is true, there are some of these letters in which he uses the terms 'that you will accommodate me;' but then in the same letter he talks of 'accommodation to us,' as if it were an accommodation to them jointly.

Looking, therefore, to the whole of this case, and particularly to the correspondence, which I had done carefully previous to the argument, and have attended to as it proceeded, I am not able to say, that the Court of Session have arrived at a wrong decision upon the facts of this case.

Then, my Lords, it is said, that if they were jointly liable, this debt has been paid, and that the promissory-note of Mr Robinson must be considered as discharged as between him and Messrs Edgars and Lyon. I agree that if he had been a mere surety, it would be extremely difficult

to say, that time having been given without his knowledge (for time had been given, so far as appears, without his knowledge), he was not discharged by that; but if he was a co-principal as between him and Edgars and Lyon, and he and Ainslie both liable as principals, whatever delay there might be in suing either the one or the other, I apprehend one cannot be discharged without both being discharged. If, therefore, they were both principals, as I apprehend they both were, the money not being advanced till the last bill of exchange was paid by Edgars and Lyon, then the debt for which they had a right to enforce their demand against Robinson and Ainslie, still continued as against both. I apprehend it is quite clear that the appellant was not discharged by the frequent renewals of those bills of exchange which had taken place. May 11, 1826.

Upon the whole, therefore, though I do not think the case perfectly free from difficulty, I cannot say that the conclusion at which the Court of Session have arrived, is wrong; but being of that opinion, I must confess, I do not think this is a case in which the appellant should be visited with costs. I think there was a sufficient ground for his desiring to have your Lordships' judgment upon the case; and therefore, my Lords, thinking there was room for doubt, and a fair question for discussion, I shall not advise your Lordships to give any costs on this case, but simply to affirm the judgment of the Court of Session.

Appellants' Authorities.—2 Barn. and Ald. 210—Chitty, 291.
Respondents' Authorities.—1 Bell, 341.—2 Barn. and Ald. Rep. 210.—3 Ersk. 4. 29.—Rutherford, Feb. 25, 1785.—(7069)—Douglas, Heron, and Co. July, 24, 1785—(7070)—Chitty (1818, edit.) p. 125.

A. MUNDELL—J. CAMPBELL, Solicitors.

Lieut.-Colonel JOHN GORDON of Cluny, Appellant.—*Shadwell—Buchanan.*
JAMES ROBERTSON and others, Respondents.—*Adam Keay.*

No. 15.

Tack—Clause.—Held (reversing the judgment of the Court of Session), that a clause in articles and conditions relative to a lease regulating the management of a farm, bearing, that 'the whole fodder to be used upon the ground, and none sold or carried 'away at any time, hay only excepted; and all the dung to be laid on the farm the 'last year of the lease,' created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the way-going crop.

MR ROBERTSON and others were tenants on the estate and barony of Slains, belonging to Colonel Gordon. No regular lease was granted to any of them, but they possessed in virtue of missives, which referred to certain articles and conditions relative to the whole estate, containing mutual obligations on both

May 19, 1826.
2d DIVISION.
Lord Cringletie.

May 19, 1826. the contracting parties, and by which all the tenants were to be governed. These articles and conditions were subscribed by all the tenants except Robertson, but he signed the scroll of a lease, in which it was stipulated that he should be bound by the terms of the articles and conditions. A printed copy of them was delivered to each tenant; and by the 16th article there was this provision: 'The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted; 'and all the dung to be laid upon the farm the last year of the 'lease.'

The leases were to endure for twenty-one years from Whitsunday 1801, and were to terminate at Whitsunday, and the separation of the crop in 1822. None of the tenants had received straw or fodder from the landlord or outgoing tenant.

At their expiration, Colonel Gordon understanding that the tenants had intimated an intention of selling the fodder of the way-going crop then on the ground, presented a summary application to the Sheriff of Aberdeenshire, against Robertson and others, and a separate one against Anderson, to have them interdicted from carrying off any part of their fodder, hay excepted, and to ordain them to use it on their farms. The Sheriff granted interim interdict, and appointed Colonel Gordon to say, whether, if the tenants must use the fodder as concluded for in the petition, he would agree to afford them accommodation for that purpose. Colonel Gordon answered, that certain of the respondents might have a barn or byre for a reasonable time; that the possessions held by the other respondents were let to different tenants, over whom he had no control; that there was little doubt that these tenants would be disposed to give what accommodation they could, but that this was a matter with which he had nothing to do, as he was under no obligation to that effect. Thereafter the Sheriff recalled the interdict, and allowed the tenants to remove and appropriate the fodder of their out-going crop according to the established usage of the country, reserving action to them individually against Colonel Gordon, for damages suffered by the illegal detention of the same.

Separate advocations were then brought by Colonel Gordon, the one of which against Anderson came before Lord Alloway, and the other against Robertson and others before Lord Cringletie, and in both these cases he relied on the decision of the House of Lords in the case of the Duke of Roxburghe *v.* Roberton. Lord Alloway reported the former of the cases to the Court on informations in respect of the above decision, which he considered as introducing a new practice into the law of Scotland on this subject; while Lord Cringletie, in the advocation

against Robertson and others, 'in respect of the judgment of the 'House of Lords in the case of the Duke of Roxburghe *v.* Ro- 'berton, "remitted" to the Sheriff to recall the interlocutors 'complained of, and to hear the parties on the allegation, that 'the articles of regulation for the estate of Slains were departed 'from, and never observed during the leases of the respondents.' May 19, 1826.

Colonel Gordon then raised an action of damages against Robertson and others for carrying off the fodder: and they having reclaimed to the Second Division, and the case of Anderson having come to be advised about the same time, the one Division required the opinion of the Judges of the other, and also of the permanent Lords Ordinary, 'upon the legal construction of the 'clause in the regulations relative to the leases of the estate of 'Slains therein referred to, especially as in this case, where, while 'the landlord insists upon the straw of the waygoing crop being used upon the farms, he maintains that he is under no legal obligation to afford upon the farms the accommodation requisite for 'such use.'

Thereafter, on a consultation and conference, the following written opinion was delivered by all the Judges, with the exception of Lord Cringletie, who gave a separate opinion.

"Cases having occurred before both Divisions of the Court regarding the import of certain clauses contained in articles of lease granted upon the estate of Cluny, it seemed expedient that both Divisions, with the permanent Lords Ordinaries, should hold a conference, and consult together; and in consequence thereof, we have perused the whole printed papers given in by the parties; and as the question which has been discussed is of great importance to the landlords and to the tenantry of Scotland, we consider it to be our duty, not merely to give our opinion, but to detail the grounds on which it proceeds.

"1st, Although a tack is said to be stricti juris, by which is meant, that the right is to be no farther extended than expressed in the deed, yet it is a personal, consensual, and bona fide contract. It is a contract entered into for mutual benefit and advantage. The obligations therefore arising, either from the nature of the contract itself, or from direct stipulation, are to be interpreted (where interpretation is not completely excluded) fairly, justly, and equitably.

"2d, The obligations between landlord and tenant, though not expressed in the written contract, have been well understood in Scotland, and are fixed by the common law, and recognized by a long course of practice in the country, and of decisions of the Court, founded mainly on the principles of the civil law.

May 19, 1626. "Among other things, it has been perfectly fixed, that a tenant, by the nature of the contract, is obliged to use the power given him over the surface tanquam bonus vir, without running out or wasting the soil; and consequently he is, under sundry circumstances (which must be left in arbitrio judicis), tied down, without any express clause, both with respect to the grounds which he may cultivate with the plough, and as to the method of cultivation and husbandry. Following these principles, it has been held and understood in practice, that a tenant cannot sell any dung produced on the farm, previously to barley or bear seed time, in the concluding year of his possession; and that he is not entitled to sell any part of the straw raised from the farm, except that of the last crop.

"3d, The improvement of agriculture in Scotland, during the preceding century, is much indebted to the practice of written leases to endure for a term of years; and it has been a great object with landlords to make these leases as perfect as possible, partly to prevent disputes about powers, and partly to guide and direct the tenants in such a mode of management, as would be beneficial to all interested.

"The desire, however, to make the written contract as complete as possible, and the anxiety, and often the ignorance of the parties and their factors and agents, have induced them anxiously to avoid omission, and to express everything, and consequently to insert in the lease many of the obligations universally understood to be incumbent on them, and sanctioned by the common law, independently of any express stipulation. Where the duties of either of the contracting parties have been acknowledged at common law, and have been defined by the undeviating understanding of the country and by practice, the mere expression in writing of those duties, and the obligations arising therefrom, cannot vary or alter the practical execution of them. What therefore would be deemed satisfaction to the common law, must be also deemed satisfaction to the written stipulation.

"4th, The term of entry adopted in pasture farms, has almost universally been fixed at Whitsunday. The kind of management proper for such farms, naturally suggests that period as prudent, expedient, and even necessary. The entry to arable farms has, in some parts of Scotland, been made by convention at the term of Martinmas after the separation of the crop, or even at the more indefinite period of the separation of the crop itself. But the great proportion of farms in Scotland are either entirely pasture, or have so considerable a part of them pasture, that the term of Whitsunday has been considered as the chief and principal term of entry. Accordingly, by the com-

mon law, all warnings to remove, made in whatever shape or form, must be given forty days prior to the Whitsunday immediately preceding the period of removal, so that the term of entry, in general, for the tenantry of Scotland, where nothing is expressed to the contrary, is held to be Whitsunday for the whole houses of every description, and for the pasture land; and Martinmas, or the separation of the grain crop, for the arable land. From this arrangement, the reaping of a crop by the outgoing tenant, after he has left the natural possession of the lands, becomes unavoidable. But this crop is by law his exclusive property, and necessary to complete the period of the stipulated annual possession; and as no way or means have been generally fixed or provided by the common law, to enable the tenant to use or consume this crop on the lands, it has necessarily de praxi been understood, that the outgoing tenant has the right to dispose of such crop at his pleasure. May 19, 1826.

"5th, In the contract of lease, parties may agree to what conditions they think proper; and if they are lawful, they must be made effectual by a Court of Justice; and if plainly and directly at variance with the practice of the country, and the rule of the common law, it must be held by the Court, that the parties did truly mean to make a practice for themselves. But the mere putting into writing an obligation, arising from the nature of the contract itself, and already recognized by the common law, will not bestow on that obligation a different effect from what it would otherwise have had, nor will it warrant such an interpretation to be put thereon as is contradictory to the common acceptation and understanding of such obligation, and such as is adverse to the true and real interest of the parties.

"6th, The clause in the articles of lease giving rise to the present question, and which is not uncommon in other tacks, is thus conceived: 'The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted; and 'all the dung to be laid upon the farm the last year of the lease.'

"The term of entry to the farm is declared to be Whitsunday; and of course it necessarily follows, that the tenant, to complete his possession, must reap his crop of grain, necessarily sown by him before Whitsunday, after he has left the houses and pasture land. In the articles of lease, no provision is made, or accommodation stipulated to be given by the landlord for the housing of this crop, or for the consumption of the straw which he takes the tenant bound to USE, not simply to leave; and yet, what is extremely material, he maintains, 'that he is under no 'legal obligation to afford upon the farms, the accommodation

May 19, 1826. 'requisite for such use.' Considering that the straw is the undoubted property of the tenant, and that neither the common law, nor the special contract, deprives him of the right to use it for the benefit of his own cattle, the plea of the landlord leads to consequences hitherto unknown in the implement of the contract of lease. The clause must be either extended so as to create or imply various obligations on the landlord and incoming tenant; and if these are not performed, there is a breach of agreement which will liberate the outgoing tenant, and leave his rights to be determined by common justice: Or if no legal obligation is to be held as implied against the landlord to afford accommodation to the outgoing tenant, as is here maintained, then the tenant is deprived of part of his property which has been purchased by his rent.

"Clauses, therefore, which are so generally expressed, without imposing co-relative obligations on the part of the landlord for the last year, can be held to apply to the conduct of the tenant only during his actual residence and the subsistence and existence of the lease, and as imperfect for the last year; and of course, that the clause under consideration must be viewed as nothing but an exposition of the common law, which requires the tenant to consume the fodder during the subsistence of the lease in all its parts.

"7th, In a lease for a period of years, when the term of entry is at Whitsunday for the houses and pasture land, and at the separation of the crop or Martinmas for the arable land, the right of use or possession of the outgoing tenant completely ceases upon the arrival of the term of Whitsunday, and separation of the crop of the year fixed by the parties. But the constructive possession of the tenant as to the arable land is continued, although after Whitsunday he cannot set his foot into the houses or offices, or upon the pasture land. After the separation of the crop from the ground, the outgoing tenant has no right of possession of any kind or nature. The decree of removing, by the law of Scotland, requires the tenant, after the term of possession is past, 'to flit and remove himself, wife, family, servants, 'cottars,' &c.; 'dependants, goods and gear, forth and from All 'and Whole,' &c.; so that the outgoing tenant, after leaving the houses and pasture land at Whitsunday, has nothing more than a right to come back to reap the crop when it is ripe; and upon which, the incoming tenant can compel him to remove off his land, and out of his way. And unless the landlord, in his new contract of lease, has taken care expressly to reserve a right to use the houses on the lands, either by himself or outgoing

tenant, the new tenant cannot be compelled, by any process at common law, to afford any such use. Under such circumstances, it has been uniformly understood, that the tenant was entitled to dispose of the straw of his outgoing crop. We consider this to be the universal practice of the country, and which has been directly sanctioned by the judgments of the Court in the cases of the Duke of Roxburghe contra Archibalds, 5th March 1785; and Jamieson, 16th May 1792; and indirectly admitted and acknowledged in the cases Pringle against M'Murdo, 30th June 1796; Earl of Wemyss against Wrights, 16th June 1801; and Forester against Wright, 19th February 1808, when such practice was attempted either to be resisted or controverted. And in consequence thereof, we can have no doubt of the understanding of the tenants on this estate, of the import of the clause in question, when they signed the articles of lease. We have as little doubt of the understanding of the landlord himself; as we observe, that, when he executed a regular lease in terms of the same articles, he put that interpretation on the obligation which was agreeable to the practice of the country. And, accordingly, in that lease it was declared, 'that the tenants should be allowed 'for a reasonable time the use of the barns, and other necessary 'accommodation for threshing out their last or outgoing crop; 'and that they should receive from the landlord, or incoming 'tenant, the value of the straw or fodder of said crop, as the 'same should be ascertained by persons to be mutually named.'

May 19, 1826.

"8th, The above regulation, allowing the tenant to dispose of his outgoing crop, has been introduced from necessity, and has been universally so understood. It occasions no injustice or damage, and is productive practically of no inconvenience to landlord or tenant. In fact, the rule generally ends in an arrangement between the outgoing and incoming tenant, by which the latter takes the crop or straw at a valuation; and as this is truly for the mutual interest of both, the matter may be said to be commonly, if not always, adjusted in this way; and if this so happens, the landlord has not the least grounds of complaint. But, even supposing that this arrangement should not take place, the landlord will not suffer, as the incoming tenant either brings the waygoing crop of his last farm along with him to his new farm, if this can be conveniently accomplished, or he will take care to provide substitutes for the fodder so taken away by the outgoing tenant, and so prepare, in kind and extent, his crop for the ensuing season. It is his interest to do so, and always has been done de praxi, without the smallest objection on the part of the tenantry. The tenant suffers nothing by it, as he again, in

May 19, 1826. his turn and in due time looks to his indemnification, by the right he has to dispose of his outgoing crop.

"But we would observe, that a contrary interpretation of a clause, so generally expressed as the present, and left to be extricated by extrinsic regulations to be arranged hinc inde between the parties, would, on the other hand, be productive of the greatest inconvenience, injury, and damage, to both the contracting parties.

"If the tenant is bound to consume or use the outgoing crop, the right to do which it is impossible to dispute, as it is his property by law, then the proprietor must furnish him with the means of doing so, and, of course, over and above the proper house and offices belonging to the farm, and necessary for the incoming tenant, he must erect proper accommodation for the use of the cattle required, and of the servants necessary to take care of them, and also for the occasional residence of the outgoing tenant to superintend them.

"Again, on the part of the outgoing tenant, over and above the cattle and horses required for the new farm he is to occupy, he must provide a stock sufficient to consume the fodder of his outgoing crop; he must hire servants to take charge of them; he must have liberty uncontrolled, to come to the farm, and look after those servants; and if he happens to be provided in a farm at a considerable distance, all this must be at a considerable expense, and necessarily at a certain loss. In fact a tenant, according to this system, must, for a certain period after leaving his farm, have two separate stocks and two separate establishments; and what adds to the inconvenience, whenever the crop is consumed, the tenant may have no alternative but to dispose of his extra stock, and to dismiss his extra servants, when nothing but loss can ensue, while e contra the landlord must have two houses, and two sets of stables, cow-houses, barns, and other offices on each farm.

"To interpret, therefore, the clause contained in the articles referred to, and as contended for by the landlord, would be to frame a new contract for the parties, contrary to the common law and practice of the country, and evidently contrary to their understanding at the commencement of their agreement, and directly injurious to their true interests.

"Lastly, If the landlord has a desire to alter the common law, consistently with the rights and interests of the parties in this contract, he has two simple known remedies, either to take the tenant bound in the lease to sell the outgoing crop to him or incoming tenant at a valuation; or at once, at the commence-

ment of the new lease, to purchase the right to the fodder, and to declare the same steelbow, and so the straw of the outgoing tenant will be deliverable in succession, from tenant to tenant. May 19, 1826.

"These modes are well known in the practice of Scotland, and particularly the last, from the earliest times; and in those districts of Scotland where agriculture has been best conducted, that mode of steelbow has been adopted with much advantage, and other regulations as to the straw of the last crop have been understood and tacitly agreed upon, between the outgoing and incoming tenant, for their mutual comfort and advantage; but such partial usage cannot form the law of Scotland, or regulate the tenantry in situations totally different.

"Taking into consideration all these reasons, we cannot consider the authority so much relied on by the petitioner as decisive of the present case, and we are persuaded that the judgment must have proceeded in some measure from the want of a full exposition of the common law and practice of Scotland.

"We therefore, upon the whole, come to the following conclusions:—

"I. That although, by the common law and practice of Scotland, a tenant is bound to consume the whole fodder of his farm on the lands during the lease, yet that this obligation has never been held to apply to the waygoing crop, and therefore that he is entitled to sell the fodder of his last crop.

"II. That the clause made use of in the articles of lease in question, unaccompanied by any corresponding relative obligation on the part of the landlord or incoming tenant, is not more extensive in its application than what would have been implied from the nature of the contract.

"III. That as no means are provided by the landlord in his articles of lease to carry into execution that for which he contends, and as he maintains that he is under no legal obligation from these articles to furnish any such, we apprehend that he is barred from putting any other construction on the clause, than what has ever been the common understanding of the country.

"IV. That in this case the tenant is entitled to dispose or carry off the straw of the waygoing crop. The contrary supposition would extend the obligation of the tack against the tenant for near a year after it had expired, after he was removed, and after he ceased to have right to come on the farm, either by himself, his servants, or his cattle, all of which he must do, if he is to use the straw on the farm; for, as the straw is his undoubted property, it is he, the outgoing tenant, who is entitled to the use of it, and not the incoming tenant or the landlord, without paying value for it."

May 19, 1826. Lord Cringletie gave a separate opinion as follows:—

"In this case the question arises relative to the meaning of a clause in general articles and conditions, laid down by Mr Gordon of Cluny, for letting his estate of Slains, in Aberdeenshire. The clause is expressed thus:—'The whole fodder to be used 'upon the ground, and none sold or carried away at any time, 'hay only excepted; and all the dung to be laid on the farm the 'last year of the lease.' The tenant pleads, that notwithstanding of this stipulation, he is entitled to sell or carry away the fodder of the crop of the last year of his lease, because it is the common custom of the country to do so; and the clause in the articles of lease stipulates no more than what is enjoined by common law. The question then is, What is the true meaning of this stipulation?

"Undoubtedly, it is the custom generally throughout Scotland, to make the term of a tenant's entry be at Whitsunday, as to the houses and grass, and to the arable land at the separation of the crop from the ground in the same year; and as the outgoing tenant must leave his farm as soon as the corn is reaped, and has previously left the houses, the general practice is, that he either sells by public auction his crop, including corn and straw, while on the ground, or to the incoming tenant, by valuation of neutral persons. Even in Berwickshire, the parent of agriculture in Scotland, the entries to farms are the same; but the practice is, that the outgoing tenant leaves the straw of his last crop to his successor. The same takes place in East Lothian, where agriculture is in its highest perfection; and the law provides the means of executing this, as without any stipulation in the lease the outgoing tenant retains the use of the barn-yard, the barns, and other accommodations, till the month of April, often till Whitsunday, and sometimes later in the succeeding year, being at same time bound to thrash out his corn regularly, so as to provide straw for the cattle of the incoming tenant. It appears to me that this practice must be at once seen to be highly useful, and right to be everywhere introduced by special stipulation; because an incoming tenant is thereby enabled to continue the same system of agriculture observed by his predecessor; he is saved the risk of either losing the straw of his predecessor's last crop, or paying an extravagant price for it at a sale; or of bringing from a distance so bulky a commodity as straw to his new farm. And it further appears to me, that Mr Gordon saw this, and meant to introduce into his estate in Aberdeenshire

that custom, observed in two of the finest counties in Scotland. He therefore stipulated 'the whole fodder to be used upon the 'ground, and none sold or carried away at any time, hay only 'excepted; and all the dung to be laid upon the farm the last 'year of the lease.' May 19, 1826.

"I cannot bring myself to think that this clause merely embodies in writing, what is understood to arise from common law. 1st, 'The whole fodder to be used on the ground.' To this extent the clause is in conformity to common law; because a tenant during his lease must use straw on the ground, except in the neighbourhood of great cities, where manure is to be had in abundance, in which case straw is universally sold. But the clause goes on to provide thus: 'And none sold or carried 'away at any time, hay only excepted.' This is directly in the face of the common practice, which is to sell the straw of the outgoing crop; for surely the last year of the lease is excluded by the words 'at any time,' and the exception of hay, which may be 'sold at any time,' fortifies the exclusion of the sale or carrying away of the straw. 2d, It is as much the practice of the country to sell all the dung remaining after sowing barley of the last crop, as it is to sell the straw; but by the stipulation in question, all the dung on the farm is to be laid on the farm the last year of the lease, which is another proof of the meaning of that article, to exclude or shut out the common practice of the country. Lastly, In point of execution, the obligation is not laid on the tenant; but it is, that the whole fodder is 'to be used 'upon the ground, and none sold or carried away at any time;' whereby it is to be left gratis to be used by the landlord or incoming tenant. And what appears to me to fortify this is, that although the stipulation relative to the dung be as much against common custom as that to the straw, there has been no sort of dispute about it. I have already mentioned, that there is no need for the law contriving means to carry the stipulation into execution, for the means are notoriously known and used in Berwickshire and East Lothian, and have been so for probably a hundred years.

"Various cases have been quoted by the tenant Anderson, in support of his argument, that he is entitled to sell his straw; but none of them appear to me to be in any way applicable. In the case of Forrester *v.* Wright, there was no question about the straw. The dispute related to a quantity of dung, and the obligation in the lease was 'to lay the whole dung thereon (viz. 'the farm), the last year of the tack at bear seed-time.' The

May 19, 1826. tenant hoarded his dung, and did not lay it on the ground, and therefore his successor was found entitled to 450 yards of dung without paying for them. In the case of the Earl of Wemyss, 10th June 1801, the tenants were bound, 'during the currency 'of their lease, to consume upon the grounds of the lands the 'whole straw and fodder of every kind, hay excepted, produced 'by the said lands, and to lay the whole dung thereby produced 'on said grounds.' It follows, of necessity, that the out-going crop, both corn and straw, belonged to the tenants, because the lease was at an end when the last crop was reaped, and the obligation was laid on them during the currency of the lease only. But the Court found the landlord entitled to retain all the dung on the farm, without payment; and in so far as the judgment relative to the dung goes, it appears to me to be decidedly clear against the tenant in this cause, because it held that the tenant was not entitled to the value of the dung bona fide remaining after bear seed-time, when by common law he was entitled to it.

"The tenant has quoted the lease, given by Mr Gordon, of one of his farms to Provost Robinson, as in his own favour; but that lease seems to me to demonstrate, that the article in the conditions of lease, on which this question turns, was distinctly understood on all hands to mean an exclusion of sale of straw at all times, comprehending the last crop as well as during the lease. For Mr Robinson would not consent to this condition of not selling the straw of the last crop, and took a lease to himself in these terms:—'And the said George and William Ro-'binson farther bind and oblige themselves and their foresaids 'to give actual residence by themselves, or a proper overseer 'or servant to manage the farm, and keep sufficient stocking 'upon the lands hereby let, and to consume with cattle upon 'the farm the whole fodder raised thereon, hay only excepted, 'and not to sell or carry away any part of the said fodder, at 'any time during the currency of the lease; it, however, being 'understood and agreed, that the said George and William 'Robinson, or their foresaids, are to be allowed for a reasonable 'time the use of the barns, and other necessary accommodation 'for thrashing out their last or outgoing crop; and that they 'shall receive from the landlord, or incoming tenant, the value 'of the straw or fodder of said crop, as the same shall be ascer-'tained by persons to be mutually named.'

"Now, it appears to me quite undeniable, that Provost Robinson understood the articles in the conditions of lease to mean positively, that the straw of the outgoing crop was to be left

without payment for it; and not consenting to that, he agreed May 19, 1826.
to leave it, but stipulated to receive its value, and took a lease to himself, departing so far from the stipulation in the articles of lease; whereas the tenant in this case possessed in virtue of these articles. Contrast the two clauses. By the one in question, the whole fodder is to be used on the ground, and none sold or carried away 'at any time.' By Robinson's lease, he is 'not to sell or carry away any part of the said fodder during 'the currency of the lease,' but provides that he shall leave the straw of the last crop on receiving payment of its value; thereby proving his idea, that the exclusion of sale and carrying away 'at any time,' comprehended the straw of the last crop, as well as of the other years of the lease. With much deference, this appears to me to prove incontestably, that the meaning of the clause was fully understood in the country; that the means of executing it were also understood, as it was provided that the use of the barns and other necessary accommodation should be given to him. This is of no inconvenience to the incoming tenant, because, having no crop, he needs neither barn-yard nor barn, nor the full compliment of horses and servants afterwards requisite, to thrash out his corn and carry it to market.

"I have said, that this is the practice in Berwickshire and East Lothian; and I believe, that in these counties the straw is steelbow; viz. that the tenant gets the straw at his entry, and leaves it at his removal; but steelbow must have had a beginning. A landlord must have agreed with his tenant that the straw of the last crop was to be left, and probably got a smaller rent during the lease than he would have obtained if the tenant had sold the straw of the last crop. In the same way here, Mr Gordon appears to me, and I think he was understood by the people on his estate, to have intended to introduce steelbow straw in Aberdeenshire; and I think that he carried that intention into execution by the clause in question; for although there be no provision for executing it, the means are well known, and in very few of the leases of East Lothian or Berwickshire, is anything said on the subject. The law provides the means where the end is in view.

"In the case of the Duke of Roxburghe *v.* John Roberton, the clause in the lease was, 'And at no time shall the said John 'Roberton, or his aforesaids, sell or give away any of the hay 'or straw of the farm, which shall always be spent on the 'ground.'

"Observe, 1st, that here is a prohibition equally applicable to hay and straw: 2d, That the tenant was not bound to spend them

May 19, 1826. on the ground; but it is declared, that they shall be spent on the ground, and at no time any part of them sold or given away. I cannot agree that the last year of his lease formed any exception; it was excluded by the words 'at no time.' This Court thought otherwise, but the judgment was reversed in the House of Lords; and I confess that I assent to every word that is contained in what is given to us as the opinion of the Noble Lord on the woolsack, when giving judgment in that case. It is in precise conformity to what I consider to be the true interpretation of the clause in Roberton's lease. It is in precise conformity to the practice of Berwickshire, East Lothian, and must be so wherever such a stipulation is made.

"But compare the present case with that of Roberton, and the conclusion will be found to be identically the same. The clause in the articles is thus conceived, 'The whole fodder to 'be used upon the ground, and none sold or carried away at any 'time, hay only excepted, and all the dung to be laid upon the 'farm the last year of lease.' There is no question about the dung in this cause. The only debate is concerning the straw; and such being the point at issue, I cannot see the smallest shade of distinction between this case and that of Roberton. In the latter, the tenant was 'at no time to sell or give away 'any of the hay or straw of the farm, which shall always be 'spent on the ground;' and in this case, the stipulation is, 'the 'whole fodder to be used upon the ground, and none sold or 'carried away at any time.' In both cases the whole fodder is to be used upon the ground; that is settled; and as the outgoing tenant is not bound to use it, nothing is required of him that he cannot fulfil. In both cases sale is prohibited at any time. In the former, it is said, that 'at no time' shall there be a sale of straw; and in this case the words are, that none shall be sold or carried away 'at any time.' It is utterly impossible for me to construe these words so as to interpolate the words 'except the straw of the outgoing crop.' The stipulation is, that the tenant shall sell or carry away none of the fodder at any time; and I cannot interpret this so as to say, that the last year of his lease is not 'at any time,' and not being at any time, he may sell the fodder of the last or outgoing crop.

"And I am no way moved by there being no provision for his thrashing out the straw of the waygoing crop; because, 1st, Such practice is no novelty in the best cultivated parts of Scotland, as I have already observed; and, 2d, The common law will compel the landlord, as it has done in Berwickshire and East Lothian, to provide the means of his tenant performing the obligation which has been imposed on him; or failing such pro-

vision, will restrain the landlord or the incoming tenant personali objectione from insisting for the 'due and forfeit of the 'bond.' May 19, 1826.

"It is with the utmost deference, as well as with reluctance, that I presume to differ from so many of my brethren; but I feel myself emboldened to do so by seeing a judgment of the highest Court in the kingdom, on a case identically the same, in conformity to my opinion; and when I feel perfect conviction that the tenant in this case must have understood the stipulation in the articles under which he possessed his farm, to have the same meaning which I affix to it, I cannot permit him to give it a different interpretation, in order to pocket the price of the straw.

"I have made no observation upon any of the specialties in the cause, because I do not think that these were intended to be submitted to my consideration."

In consequence of these opinions, the Second Division, on the 11th March 1825, found, 'That in this case the tenants are entitled 'to dispose or carry off the straw of the waygoing crop. There-'fore, alter the interlocutor complained of; dismiss the advoca-'tion, and remit the cause simpliciter to the Sheriff, and de-'cern, &c.—Find the petitioner entitled to expenses,* and at 'the same time assoilzied in the action of damages.' The First Division also, after having previously to the consultation pronounced a judgment on a specialty (which was afterwards explained did not exist), and stating that they had consulted with the other Judges, 'in relation to the general question at issue, be-'tween the parties in this cause, recalled their interlocutor, 'and found that the 16th article of the general articles of lease 'regarding the estate of Cluny, cannot be held as applying to the 'crop of the last year of the lease, and that the right of the par-'ties respecting the same must be regulated by the common law 'and usage of the country; and therefore, repelled the reason of 'advocation,—remitted the case simpliciter, to the Sheriff;' and found Colonel Gordon liable in expenses.†

Colonel Gordon then entered an appeal, both on the advocation and the action of damages, against Robertson and others.

Appellant.—The clause is explicit and unambiguous, and ought to be interpreted according to its obvious meaning and import. The articles and conditions had never been departed

* See 3 Shaw and Dunlop, No. 440.

† See 4 Shaw and Dunlop, No. 12.

May 19, 1826. from. Take the custom and common law to be, that the fodder of the last year is excepted—this exception is, by written agreement and contract of parties, excepted. The argument ab inconvenienti, from the want of accommodation to the outgoing tenant, cannot affect a deliberate contract of parties, nor indeed does any practical inconvenience ensue. Even if the tenants had received no straw at entering, it is obvious that the rents were adjusted in reference to the whole obligations in the leases. But the very point at issue has already been tried and settled by the Court of last resort.

Respondents.—By common law and practice, although the fodder of the current year must be consumed on the farm, yet the tenant, except in the case of steelbow, is entitled to sell or dispose of the fodder of the waygoing crop, as he pleases, and there are obvious and sound reasons for such a rule. The straw is the exclusive property of the tenant, and if he cannot take it away, he must lose it altogether; for the appellant denies that he is bound to afford accommodation to the outgoing tenant, and without that accommodation the tenant cannot use the fodder on the farm. Even if the outgoing tenant had a legal right to barns, &c., for that purpose, and had access to them, how could he be expected to keep up two establishments? The clause, in point of fact, was not intended to control the rights of parties as at common law, and the practice of the country, but merely to express the law of landlord and tenant; therefore, what is satisfaction to law, is satisfaction to this stipulation; no doubt common-law rights may be altered or relinquished, but that is not to be presumed from words of vague and doubtful meaning. 'At any time,' obviously refers to the currency of the lease; but the waygoing crop is reaped after the termination of the lease, and the removal of the tenant. The clause was merely introduced to corroborate the obligations implied in a lease, and not to abrogate them. The respondent's pleas are supported by various authorities in the law of Scotland. The case decided in the Court of last resort, is materially different from the present; besides, the 'articles and conditions' in question, were departed from by the tenants, and the departure sanctioned by the landlord.

The House of Lords found, that the tenants were not entitled to carry away the straw or fodder of the waygoing crop; and therefore ordered and adjudged that the interlocutors complained of be reversed, and that the Court of Session proceed to decide the other points of the cause.

LORD GIFFORD.—My Lords, there is a case, which stands for the judgment of your Lordships, which involves a question of considerable importance, not only in itself, but as it affects a judgment of your Lordships' house: I refer to the case of Gordon and Robertson. I must confess, I approach the consideration of this case with considerable concern; and I hope your Lordships will excuse my saying so when I state the nature of it. May 19, 1826.

My Lords, the appellant in this case is Lieut.-Colonel Gordon, and the respondents were tenants of different farms belonging to the extensive Barony of Slains. The leases were all of the same date, and were for 21 years, and expired at Whitsunday and the separation of the crop in 1822. My Lords, with the exception of one tenant, Mr Robinson, none of the tenants possessed under regular leases, but all of them held by separate missives, as they are termed, in reference to which certain printed articles and conditions were laid down by Mr Gordon, relative to the cultivation of his estate. My Lords, it may be necessary that I should call your Lordships' attention, in this stage of the cause, to the articles and conditions which were proposed by Mr Gordon. They were to be for 'a twenty-one 'years' lease to be granted, and the tenant to be tied down to actual re-'sidence; assignees and subtenants, legal or voluntary, without the pro-'prietor's consent, to be excluded; the farms to be let, and marches lined 'out and fixed, agreeable to Mr Johnston's plan; supposing the above rent 'to be L.2500, Mr Gordon agrees to allow L.400 a-year of it for the 'first three years, to be given the tenants in lime, in proportion to their 'rents, retaining a due proportion for the three farms still under lease; 'Mr Gordon to purchase the lime, but the tenants to carry it, and furnish 'certificates of what they receive and use.'

Then there is this stipulation, by which Mr Gordon was to allow 'as 'much of the first year's rent, as, when added to the present value of big-'gings belonging to him on each farm, will be equal to the said year's 'rent, for building suitable dwellings and offices, agreeable to the plan 'fixed by him, the dimensions to be larger or lesser in proportion to the 'rent and extent of the farm; the tenants finding all the carriages, and 'recompensing the outgoing tenant where he has any claim for meliora-'tions.'

Then, if the tenant wishes to make enclosures 'by making the outer 'fences stone dykes, and the inner subdivisions ditch and hedge, lined out 'to the satisfaction of the factor for the time, they shall be allowed by the 'heritor, at the expiry of their lease, the value of such enclosures and 'fences, according as shall be valued by men mutually chosen, providing 'such enclosures are then fencible.'

I am detaining your Lordships by enumerating these articles, in order to show you the particularity of them, and the nature of the stipulations, both on the part of the tenant and on the part of Mr Gordon. Then it stipulates, 'that the victual rent should be payable 'twixt Yule and 'Candlemas, and the money rent at Martinmas and Whitsunday each 'year; and the tenants should be allowed to give houses, yards, and por-

May 19, 1826. 'tions of land to such cottars only as were necessary for assisting in the 'culture of the farm; and that the proprietor should pay cess and stipend, 'but the tenant to pay schoolmaster, ground officer, moss grieve, statute 'labour, and all other incidental and parochial burdens or assessments 'imposed or to be imposed.' There is then a stipulation as to the rotation of cropping; and that the tenant was to have the 'privilege of firing 'for their own use from the common moss of the estate, and of marl 'shell, or other common manure.' Then there comes a stipulation, which I call your Lordships' attention to: 'The whole fodder to be used upon 'the ground, and none sold or carried away at any time, hay only excepted; and all the dung to be laid on the farm the last year of the lease.'

My Lords, the respondents entered on the farms under these conditions at Whitsunday 1801. Your Lordships perceive, therefore, that the term expired in 1822, and of course before the last crop was taken from the ground. Mr Gordon, discovering that the tenants meant to insist that they had a right to take the crop and carry off the straw, he made an application to the Sheriff of the county, setting forth the terms of the lease, and stating that his prayer was to ordain the tenants to use the fodder of the present crop upon the respective farms where it presently grows on the lands of Slains; and in the meantime to prohibit and discharge them, and each of them, from carrying off any part of the fodder of the said farm. The object of that proceeding was to prevent their carrying off the straw of the last crop. The respondents appeared to resist the application, on the grounds which have been already alluded to. The Sheriff, on the 4th November 1822, gave the following deliverance:— 'Before farther answer allows the procurator for the petitioner to see the 'quadruplies, and appoints the petitioner to state whether or not, on the 'supposition it shall be found that the respondents must use the fodder 'in question, as concluded for in the petition, the petitioner will agree to 'afford them accommodation for that purpose, as stated in the quadru-'plies,' which was a sufficient barn for threshing out the crop, and a sufficient accommodation of houses to contain their cattle while consuming the straw; and finally, he pronounced an interlocutor, by which he allowed the tenants 'to remove and appropriate the fodder of their outgoing crop, 'according to the established usage of the country, reserving action to 'them individually against the petitioner for damages suffered by the 'illegal detention of the same.'

The appellant brought the judgment of the Sheriff under the review of the Court of Session. A bill of advocation was passed, and the cause came before Lord Cringletie, and, as Lord Ordinary, he pronounced an interlocutor, in which he stated, that, 'In respect of the judgment of the 'House of Lords, in the case of the Duke of Roxburghe against Robert-'on, remits to the Sheriff to recall the interlocutors complained of, and 'to hear the parties on the allegation, that the articles of regulation for 'the estate of Slains were departed from, and never observed during the 'leases of the respondents, as well as any of the other points of the cause, 'and dispenses with a representation.'

Your Lordships perceive that the Lord Ordinary remitted the cause to the Sheriff to recall his interlocutors; but against this interlocutor the respondents presented a reclaiming petition. The cause came before the Second Division of the Court of Session, and they pronounced, on the 22d of May 1824, the following interlocutor:—'The Lords of the Second Division, in terms of the Act of Parliament thereanent, require 'the opinions of the Judges, either as a collective body or as individual 'Judges, upon the legal construction of the clause in the regulations relative to the leases of the estate of Slains therein referred to, especially 'as in this case.' In consequence of this, their Lordships of the First Division, and the permanent Lords Ordinary, took the case into consideration; and their Lordships of the First Division and the permanent Lords Ordinary, with the exception of Lord Cringletie, concurred in an opinion altogether favourable to the respondents, 'being of opinion that 'the respondents were entitled to carry off the straw of the waygoing crop.' My Lord Cringletie was the single Judge dissenting from that opinion; and he dissented from it mainly upon the principle of a decision to which I will call your Lordships' attention, considering that this case could not be distinguished from a case which was heard by your Lordships' House in the year 1820, of the Duke of Roxburghe *v.* Roberton. May 19, 1826.

It appears that by the custom of Scotland, (when I say the custom of Scotland, I mean the prevailing usage of a great part of Scotland,) where there is no stipulation between a landlord and tenant with respect to the straw or fodder, the tenants usually enter after the regular expiration of the term to reap the crop; and therefore, having the crop to reap after the expiration of their term, are entitled, where there is no stipulation to the contrary, to take away the straw of the waygoing crop. And, my Lords, I observe the learned Judges, in giving their opinion, talk of this—sometimes as the common law—and at others, as the custom of the country; but it appears not to be universally prevailing, for in parts of Scotland, particularly in East Lothian, I think, and Berwickshire, the custom prevails, that the incoming tenant has the straw of the last crop of the outgoing tenant, and then he leaves on the land he is quitting the straw of his last crop: And this is called receiving in steelbow.

The learned Judges appear to have been of opinion that this common law or custom ought to prevail in this case, notwithstanding the stipulation that the tenant has entered into, and although the articles in question bound him not to carry off or sell at any time; the words of the obligation being, 'the whole of the fodder to be used upon the ground, 'and none sold or carried away at any time, hay only excepted; and all 'the dung to be laid on the farm the last year of the lease.' They consider that, with reference to the usage, it ought to be construed with the exception of the last crop; and no less than thirteen of the learned Judges (which makes this a painful case to deal with, if your Lordships shall differ from that opinion) expressed an elaborate opinion, that the custom of the country, or the common law with respect to the waygoing crop, is to prevail, notwithstanding the stipulation introduced into these

May 19, 1826. articles, and that that stipulation ought not to be considered as inconsistent, but rather as made with a view to the general custom of the country.

But I should state to your Lordships what they admit in the 5th division of their opinion. They state that, 'In the contract of lease parties 'may agree to what conditions they think proper, and if they are lawful, 'they must be made effectual by a court of justice, and if plainly and 'directly at variance with the practice of the country and the rule of the 'common law, it must be held by the Court that the parties did truly 'mean to make a practice for themselves; but the mere putting into writing an obligation arising from the nature of the contract itself, and already recognised by the common law, will not bestow on that obligation 'a different effect from what it would otherwise have had, nor will it 'warrant such an interpretation to be put thereon as is contradictory to 'the common exception and understanding of such obligation, and such 'as is adverse to the true and real interests of the parties.' Then they say that this clause, 'the whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted, and all the 'dung to be laid upon the farm the last year of the lease,' is not an uncommon provision in other tacks.

They conclude thus:—'Clauses, therefore, which are so generally 'expressed, without imposing co-relative obligations on the part of the 'landlord for the last year, can be held to apply to the conduct of the 'tenant only during his actual residence and the subsistence and existence of the lease, and as imperfect for the last year; and of course, that 'the clause and the consideration must be viewed as nothing but an exposition of the common law, which requires the tenant to consume the 'fodder during the subsistence of the lease in all its parts.' They also say, that 'If the landlord'—I beg your Lordships' attention to this—'If 'the landlord has a desire to alter the common law consistently with the 'rights and interests of the parties in this contract, he has two simple 'known remedies, either to take the tenant bound in the lease to sell the 'outgoing crop to him or incoming tenant, at a valuation, or at once, at 'the commencement of the new lease, to purchase the right of the fodder, 'and to declare the same steelbow; and so the straw of the outgoing 'tenant will be deliverable in succession from tenant to tenant. These 'modes are well known in the practice of Scotland, and particularly the 'last, from the earliest times, and in those districts of Scotland where 'agriculture has been best conducted, that mode of steelbow has been 'adopted with much advantage, and other regulations as to the straw of 'the last crop have been understood and tacitly agreed upon between the 'outgoing and incoming tenant, for their mutual comfort and advantage, 'but such partial usage cannot form the law of Scotland, or regulate the 'tenantry in situations totally different.'

Now, my Lords, I come to a passage which I read with considerable pain, because I apprehend that the decisions of your Lordships' House, whether they are on Scotch cases, or whether they are on English cases,

or whether they are on Irish cases, are to be taken when so pronounced as a rule for decisions in future; and however the opinions of learned Judges may differ from the opinions that are entertained by your Lordships, or by those who advise your Lordships, I apprehend, that being once pronounced by your Lordships, it is their duty to follow and to carry into effect those decisions. My Lords, they make this remark upon a decision to which I am about to call your attention. 'Taking into consideration all these reasons, we cannot consider the authority so much relied on by the petitioner as decisive of the present case; and we are persuaded that the judgment must have proceeded, in some measure, from the want of a full exposition of the common law and practice of Scotland.' My Lords, when I call your Lordships' attention to that case, and to the judgment which was pronounced by the Lord Chancellor upon it, I think your Lordships will perceive that the Lord Chancellor, in point of fact, acted with especial reference to what was considered the common law of Scotland, and that he also acted with a reference to the undoubted principle, that it was competent for the landlord to make what stipulations he pleases. The tenant, when he enters into a lease, if it is disadvantageous to him to leave the fodder or the straw, takes that into consideration in the rent which he pays. My Lords, in this case there is another stipulation with respect to the dung; and I find that the learned Judges, particularly my Lord Cringletie, says, that stipulation is contrary to what is considered to be the common-law usage in Scotland with respect to the dung. The stipulation respecting the dung is, that all the dung be laid upon the farm the last year of the lease. My Lords, what does my Lord Cringletie say upon that? He says, 'This is directly in the face of the common practice, which is to sell the straw of the outgoing crop. It is as much the practice of the country to sell all the dung remaining after sowing barley of the last crop, as it is to sell the straw; but by the stipulation in question, all the dung on the farm is to be laid on the farm the last year of the lease, which is another proof of the meaning of that article to exclude or shut out the common practice of the country.' If it be the common practice, that where there is no stipulation between the landlord and the tenant, the tenant shall be at liberty, in the last year of the term, to sell the dung remaining after sowing barley of the last crop; it appears to me, that in the case of a stipulation that all the dung shall be laid upon the farm the last year of the lease, the common usage and common law of the country being that the tenant was not bound to lay it, it might be as well contended that he had a right to take off the dung, which is not contended in this case.

May, 19 1826.

Your Lordships will perceive, that in this case, as well as in the case of the Duke of Roxburghe *v.* Roberton, which is referred to in a part of this judgment, there was a written stipulation between the landlord and the tenant; and if that written stipulation be distinct and clear in its terms, (it being competent for the parties to make those stipulations they think fit,) no common-law usage can negative the contract of the parties. I have read to your Lordships a number of the stipulations, and your

May 19. 1826. Lordships will perceive there is a variety of particular stipulations with respect to rotations of cropping, very beneficial, for aught I know—(ignorant as I profess myself to be upon that subject, not that I think an ignorance of that subject prevents the coming to a right conclusion on this contract)—but, at the same time, the stipulation with respect to the rotation of croppings in this contract may be contrary to that which, in the absence of the stipulation, would be required by the landlord, or agreed to by the tenant. But what is to prevent Mr Gordon introducing upon his farm that which is admitted to be the custom and usage in East Lothian and Berwickshire? What is to prevent his saying, I will stipulate with these tenants that they shall leave the fodder of the last crop, because I mean to introduce this mode of husbandry into my farm; the incoming tenant shall have the advantage of that, and I will not let my lands without stipulating that he shall have it. The learned Judges do not say that it is illegal to make stipulations contrary to the common usage and common law of the country. They admit that it is legal to make such stipulations, and, if such stipulations are made in precise form, it is admitted that those stipulations must be obeyed.

My Lords, this case comes then to a very narrow question—What is the meaning of the stipulation in question? But what was the question in the Duke of Roxburghe against Roberton? After all the attention I have been able to give to this case, I am perfectly unable to find any cause for the observations to which that judgment of your Lordships has given rise; and I did take the liberty of saying, when the case was before your Lordships on a former day, that, considering the expressions which had been used by the learned Judges, I thought it was incumbent upon your Lordships to come to a solemn, deliberate, and dispassionate consideration, uninfluenced by anything which might have passed in the Court below upon the subject of that judgment; and I very much regret that in this case there should have been introduced into the printed papers, after the well-considered, deliberate opinions of the learned Judges of the Court below, any hasty observations made at the time this cause was there heard, and which one cannot conceal from one's self were intended to throw discredit upon your Lordships' judgment in the preceding case, being intended to have the effect of showing that your Lordships' judgment had not proceeded with that attention to the law of Scotland which ought to be paid to it.

I have now a note of the judgment of your Lordships in the case referred to, and I will state to your Lordships what that case is, which I will read from the report published by Mr Bligh,—'In 1790, a farm 'called Newton, being parcel of the entailed estate of Roxburgh, was let 'by John, Duke of Roxburghe, for twenty-one years from that date, to 'John Roberton, the respondent. In the lease there was a clause in 'these words: Farther, the said John Roberton, or his foresaids, at their 'removal from the said lands, shall be obliged to leave upon the ground 'all the dung and manure of the preceding year, but the value thereof 'shall be paid to them by the succeeding tenant, as the same shall be as-

'certained by two neutral men, one to be chosen by each party; and at May 19, 1826.
'no time shall the said John Roberton or his foresaids sell or give away
'any of the hay or straw of the said farm, which shall always be spent
'on the ground.' Your Lordships observe these words—'This lease ex-
'pired in 1811,' but, by agreement with the factor, the tenant was per-
mitted 'to possess until Whitsunday 1815, on the same terms as in the
'lease, which was to be held as continued to that period.' In August
1815, the tenant informed the manager of the Roxburgh estate, 'that he
'meant to sell the whole straw of that last crop, unless the appellant
'would take the crop, both corn and straw, at a valuation. The appel-
'lant having no occasion for the corn declined this proposal, stating, that
'he conceived the straw could not be sold, but must be consumed or left
'on the farm, without valuation to be paid by the landlord; but as the
'respondent disputed that point, the appellant proposed that the straw
'should be left, a valuation being put upon it: and the appellant (the
'Duke of Roxburghe) bound himself to pay that valuation in case it
'should appear that the tenant was not bound to consume or leave the
'straw upon the farm. This proposal was rejected by the respondent,
'who threatened to sell the straw. The appellant thereupon obtained
'letters of suspension and interdict. These letters were afterwards brought
'to be discussed before Lord Pitmilly, who pronounced the following in-
'terlocutor:—The Lord Ordinary having considered the foregoing minute
'for the charger, with the answers thereto for the suspender, and whole
'process, repels the reasons of suspension, and recalls the interdict, and
'decerns. A representation being made against that decision, another
'interlocutor was pronounced, in which the Lord Ordinary adhered to the
'interlocutor represented against. A petition was then presented by the
'appellant to the Second Division of the Court of Session, and their
'Lordships having heard the petition, they adhered to the interlocutor
'complained of, and refused the desire of the petition; their opinion be-
'ing, that, notwithstanding this stipulation in the lease, he was entitled to
'carry off the straw produced by the crop of last year.'

My Lords, that case was argued here precisely on the same ground as the present, namely, the custom and usage of the country; and that, therefore, that custom and usage was to control the natural meaning of those words, and that those words were to be made consistent with the usage and custom. On the other hand, it was contended, that usage and custom had nothing to do with it, but that the House must be governed, and the Court of Session must be governed, by express agreement.

The Lord Chancellor pronounced this judgment, which I am the more anxious to read, that your Lordships may see the grounds on which the Lord Chancellor proceeded. After stating the terms of the tack, he says —'The tenant relies upon the provision expressed, that the dung and
'manure is to be left upon the ground, and paid for, according to a valu-
'ation, but that as to the hay and straw, it is not to be left or paid for:
'the absence of any such provision (according to this argument) shows

May 19, 1826. 'that the tenant was to be at liberty to carry and take away, at the expi-
'ration of the lease, the hay and straw of the last year; that the prohibi-
'tion extends only to selling or giving away, and as to the expression
'which provides that the hay and straw shall be always spent on the
'ground, it is to be construed as applicable only to the currency of the
'lease, and not to an act which takes place at or after its termination. It
'is, moreover, contended on his behalf, that as he, or those in whose
'right he stands, upon their accession to the farm, received no hay or
'straw, which was taken away by the preceding tenant, he will receive no
'consideration for those articles, unless he is permitted to take them
'away; but this is an argument which cannot be admitted to have weight
'against the expressions, or to affect the fair construction of the instru-
'ment which ascertains the right of the parties. Supposing all the facts
'to have been proved which ought to form the ground of such an argu-
'ment, the law requires us to presume a consideration for this sacrifice on
'the part of the tenant, in the nature and conditions of the contract, and
'the amount of the rent to be paid by him. He binds himself by express
'obligation, and it must be inferred and implied, that in his contract, he
'stipulated for some equivalent benefit. In the case of a reciprocal con-
'tract, such as this, a party cannot be admitted to say that he has no con-
'sideration for a sacrifice which he binds himself to make. When a te-
'nant is making such a bargain, is it probable that he should forget his
'interest so far, as not to provide, in the other conditions of the lease, a
'consideration for what he gives up to the landlord?

'The dung and manure is to be left on the ground, and paid for. An
'inference from the provision is drawn, that what, according to the ex-
'pressions of the contract, the tenant is not bound to leave, he may carry
'away. But that is not a conclusive argument, because it is necessary to
'attend to the further provisions of the lease. Nothing is said as to any
'payment for hay and straw; and the clause which provides what shall
'be done at the removal—that is, the expiration of the lease—stipulates,
'that the hay and straw of the farm "shall always be spent on the ground,"
'not that the tenant shall spend it—an expression which might possibly
'lead to a different construction. The provision that the tenant shall at
'"no time" sell or give away the hay or straw, is absolutely incompatible
'with the supposition of a right in the tenant in any manner to eloign
'those articles during the last year, if indeed the express words of the in-
'strument leave us at liberty to enter into conjectures as to any intention
'except to the last year of the lease.

'The case put for the appellant, of an accumulation of hay and corn
'during three years, or more, which might be found upon the farm, du-
'ring the last year, shows the consequence to which the argument for the
'respondent would lead. The manure is collected and prepared by the
'labour of the tenant, but hay and straw are almost the spontaneous
'growth of the land. It might be reasonable, therefore, that such a dif-
'ference as we find in this contract, should be made as to those respective
'articles.

'The tenant, in this lease, was to enter upon the arable lands at the se- May 19, 1826.
'paration of the crop, and to quit at the corresponding period. In such
'a case, where no special provision is made by contract, the law of cus-
'tom may qualify the right of the incoming tenant, and give to the out-
'going tenant certain privileges for the purpose of threshing, after the
'expiration of his lease. That is a question upon the customary law of
'Scotland, which it is not necessary that we should deal with in this case.
'Assuming or admitting the existence of such law, founded on custom,
'we have here to construe a written contract, and if the Scotch laws are
'to be administered on the same principles as English law, or any law
'founded on principle, we must hold that the engagement of parties to
'each other by the express stipulation of a written instrument, exclude all
'consideration of the custom of the country.

'Resting upon such principles for the direction of our judgment, can
'we hold that the words, "at no time shall sell or give away the hay
'and straw, but that the same shall always be spent on the ground," are
'consistent with a right in the tenant to collect hay and straw during the
'last year, or any preceding years, and to carry away what he has col-
'lected at the expiration of the tenantcy?' Judgment reversed.

My Lords, in that case his Lordship felt himself bound to recommend the reversal of the judgment of the Court below, and it was accordingly reversed, taking care to express a declaration to this effect, that according to the true intent and construction of the tack, the tenant was not entitled to sell or give away any of the hay and straw at any time during the continuance of the tack, or at the time of the expiry of the tack.

In this case, the words are almost the same, or similar to those which were used in the Duke of Roxburghe's case; 'and at no time shall the 'said tenant sell or give away any of the hay or straw of the said farm, 'which shall always be spent on the ground.' The language of the stipulation in this case is this: 'The whole fodder to be used upon the 'ground, and none sold or carried away at any time, hay only excepted.'

Now, my Lords, in addition to the judgment as stated in the report, the parties, in some of the papers, have printed what is supposed to be, and probably is, a correct judgment, as taken from the short-hand writer's notes. I do not perceive there is any material difference between the two, though, in point of language, there may be some variation; but I do not perceive, in the shape of arguments, any difference between the two statements of the noble and learned Lord's speech. He there concludes by saying, 'That the very object of having a written contract in some 'cases, is to shut out the custom of the country, and where the landlord 'and his tenant agree that the tenant at no time shall take hay or straw 'off the premises, that can never mean that he shall not do so for twenty 'years, but that in the last year he shall employ himself at any time, from 'the beginning of January, to the last day of December, in taking it off 'the premises.' His Lordship says, 'I remember a case that occurred 'when I was much younger than I am now, on the question of copy-right, 'when this House required the attendance of the learned Judges, and they

May 19, 1826. ' were here engaged three days in giving their opinions; but when it came ' to the turn of Mr Baron Perrot, he shortly said, that the statute of ' Queen Anne provides, that the author should have a right to his work ' for fourteen years, and no longer; that for the life of him, he could not ' construe these words, " and no longer," to mean " for ever," or any time ' beyond the expiration of fourteen years.' Upon which my Lord Chancellor says, ' I cannot, for the life of me, conceive how the words, " at no ' time," can mean at any time during the last twelve months of this tack.'

My Lords, therefore, in point of principle, I should say, that no distinction can be raised between the two cases, and, with great deference, I should have thought the one must have been governed by the other. Here is a decision proceeding upon as solemn and sound a principle as can well be stated, namely, when you have a written stipulation between a landlord and tenant, you are to construe that stipulation according to the fair meaning and import of the language used, and that it ought not to be controlled by any supposed custom or usage which might govern the relation between them in the absence of such express stipulation.

There is another circumstance to which I would direct your Lordships' attention, in the argument of the learned Judges in the Court below. In pronouncing their opinion, they take notice, that one of the parties who was about to enter into an agreement for a tack of a similar kind with Colonel Gordon, had his tack regularly reduced into a formal shape; and it is obvious that that gentleman, fully understanding the object of that stipulation, says, I am not content with it, but I will have a different stipulation inserted in my case, and accordingly your Lordships will find, that in the tack granted to Mr Robinson, there is this stipulation which is stated in Lord Cringletie's judgment: ' And the said George and Wil- ' liam Robinson further bind and oblige themselves, and their foresaids, ' to give actual residence by themselves, or a proper overseer or servant ' to manage the farm, and keep sufficient stocking upon the farm hereby ' let, and to consume with cattle upon the farm the whole fodder raised ' thereon, hay only excepted, and not to sell or carry away any part of the ' said fodder at any time during the currency of the lease; it, however, ' being understood and agreed that the said George and William Robin- ' son, and their foresaids, are to be allowed, for a reasonable time, the ' barns, and other necessary accommodation for threshing out their last ' or outgoing crop, and that they shall receive from the landlord, or in- ' coming tenant, the value of the straw or fodder of said crop, as the same ' shall be ascertained by persons to be mutually named.' Why, my Lords, the learned Judges seem to think, that that stipulation being inserted in Mr Robinson's tack, shows what is the understanding between the parties as to the nature of that stipulation to which I have called your attention in the original article. My Lord Cringletie observes upon this: ' Now, it appears to me quite undeniable that Provost Robinson quite ' understood the article in the conditions of lease to mean positively that ' the straw of the outgoing crop was to be left without payment for it; ' and, not consenting to that, he agreed to leave it, but stipulated to re-

'ceive its value, and took a lease to himself, departing so far from the 'stipulation in the articles of lease; whereas the tenant, in this case, 'possessed in virtue of the articles.' Therefore he says, and I own it appears to me that the conclusion is well founded, that, looking to Robinson's stipulation, which he insisted upon having in that lease, that without that stipulation, he was bound to leave the straw belonging to the waygoing crop; but he was at liberty to say, as this tenant might say, that he would not consent to such a contract unless paid for the value of the straw by the incoming tenant. Now, my Lords, you will observe, that it is not, as the learned Judges think, that that stipulation enabled him to carry away the straw; but he felt that that stipulation bound him to leave the straw, and therefore he says, I will contract to receive from the landlord, or the incoming tenant, the value of the straw or fodder of such outgoing crop; therefore, if any argument is to be drawn from the stipulation in Mr Robinson's tack, it bears against the general reasoning of the learned Judges. May 19, 1826.

Upon the whole, my Lords, it appears to me, that, acting upon the sound principle laid down in the Duke of Roxburghe's case, and looking at the express stipulation entered into by these parties, conceiving, as I do, and as it is admitted by the learned Judges, that it is competent for parties to make this stipulation, contrary to, and in spite of, any custom or usage against it, I cannot arrive at any other conclusion than that the tenant is bound not to carry off the crop at any time during the continuance of that lease.

My Lords, I may just read to your Lordships the last part of my Lord Cringletie's judgment, where he is commenting upon the language of the stipulation in the case of the Duke of Roxburghe v. Roberton. He says, 'Compare the present case with that of Roberton, and the conclusion 'will be found to be identically the same. The clause in the articles is 'thus conceived: "The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted, and all 'the dung to be laid upon the farm the last year of the lease." There is 'no question about the dung in this cause; the only debate is concerning 'the straw; and such being the point at issue, I cannot see the smallest 'shade of distinction between this case and that of Roberton.' He also says, 'I cannot agree that the last year of his lease formed any exception. 'It was excluded by the words "at no time." This Court thought otherwise, but the judgment was reversed in the House of Lords; and I confess that I assent to every word that is contained in what is given to us 'as the opinion of the noble Lord on the woolsack; it is in precise conformity to what I consider to be the true interpretation of the clause in 'Roberton's lease; it is in precise conformity to the practice of Berwickshire, East Lothian, and must be so whenever such a stipulation is made.' Therefore, his Lordship concludes with saying, 'It is with the utmost deference, as well as it is with reluctance, that I presume to differ from so 'many of my brethren, but I feel myself emboldened to do so by seeing 'a judgment in the highest Court of the kingdom identically the same in

May 18, 1826. 'conformity to my opinion; and when I feel perfect conviction that the 'tenant, in this case, must have understood the stipulation in the articles 'under which he possessed his farm to have the same meaning that I have 'affixed to it, I cannot permit him to give it a different determination, in 'order to put into his pocket the price of the straw.'

My Lords, looking carefully at this case, I do not see how it can be distinguished, either in its circumstances or upon principle, from the case of Roxburghe *v.* Roberton; and, considering it to be of the utmost importance, in the administration of the law, that your Lordships' decisions should be followed up (for otherwise the greatest uncertainty must prevail); and much as I lament differing from so many learned persons, who have pronounced their opinions upon this case hostile to the interests of the appellant, yet, as it appears to me that that decision manifests great opposition to the principle in the case of the Duke of Roxburghe *v.* Roberton, I feel myself bound to come to the conclusion (notwithstanding that conclusion leads me to advise your Lordships to do that which was done in the case to which I have first alluded), namely, to reverse the judgment, accompanying it with a declaration that the tenant was not entitled to sell, or carry away, any of the straw of the last or waygoing crop; and that, with such declaration, it should be remitted back to the Court of Session, and, further, to do that which, in this case, should be just and necessary.

My Lords, as I have already stated, it will be distinctly understood by the Court below, that I do not profess to understand what the usage in Scotland is; but, my Lords, if this had been a question turning upon what the usage is in Scotland, and whether the tenant had conformed to that usage or not, you would have had that distinctly ascertained by evidence laid before you for that purpose; but I would say, in this case, as the Lord Chancellor said in the Duke of Roxburghe's case, whatever the custom and usage may be, in the absence of express stipulation, I give my opinion upon the express stipulation. This contract, which appears to be quite unambiguous and clear, contains a stipulation, which was competent for the landlord to require, and the tenant to give; by which the tenant bound himself not to remove any straw during the time he took the farm under these articles, and consequently prevented him removing it during the last year of his possession.

My Lords, there is another case on the same subject, arising out of the same transaction, and between the same parties, in which I apprehend your Lordships' judgment must be the same as in that I have just asked your opinion. In that case, the judgment was adverse to the claim of Colonel Gordon; but if your Lordships think that the judgment must be reversed in the other case, the same decision must follow in this, namely, to reverse the judgment, and to remit both the causes back to the Court of Session, with that declaration which I have suggested to your Lordships.

Appellant's Authorities.—4 Stair, 42. § 21. 1 Ersk. 1. 50. 3. 3. 87. Duke of Roxburghe *v.* Roberton, 28th June 1816, reversed in the House of Lords, 17th July 1820. (2 Bligh's reports, 156).

Respondents' Authorities.—1 Bell on Leases, p. 323, (Edit. 1825.) Hamilton, 15th Jan. 1824.—2 Shaw and Dunlop, No. 586. Gordon v. Falconer, 8th March 1822.—1 Shaw's Reports, No. 440. Wemyss, 16th June 1801, (No. 7. ap. Tack.) Forrester, 10th Feb. 1808, (No. 16, ib.) Fraser, 7th March 1823. 2 Shaw and Dunlop, No. 256. May 19, 1826.

J. CHALMERS, J. CAMPBELL, Solicitors.

DAVID CARRICK BUCHANAN, Esq. Appellant.—*Bosanquet—Keay.* ROBERT MORRICE and Others, Respondents.—*Murray—Tindal.* No. 16.

Society.—Circumstances in which it was held (affirming the judgment of the Court of Session) that certain shipments of goods to the Continent of Europe, during the war between France and Britain, made by an individual partner of a company, who was a citizen of America, belonged to him exclusively, and that his partner, who was a subject of Britain, had no claim to them, in consequence of letters written by him, disclaiming all connexion with the goods, although he alleged that these letters were written to deceive the enemy.

May 19, 1826.

2d DIVISION. Lord Cringletie.

DAVID CARRICK BUCHANAN, a native of Britain, and resident in London, was connected in several commercial copartneries in Virginia, with Robert and Allan Pollok, and Thomas Tredway. These houses were managed by the latter individuals; but there was also a London establishment connected with them, which was conducted by Buchanan, under the firm of David Buchanan. In this establishment he and Robert Pollok were alone partners.

Robert Pollok, who was an American citizen, made shipments of tobacco from Virginia to Holland, twice by the ship Mount Vernon in 1806, by the Alonzo in 1807, and again by the Mount Vernon in July 1807, during which time Britain was at war with Holland, then under the dominion of France, and the British Orders in Council were in force. These cargoes, which were taken by Pollok from the stock of the company at the regular prices, were sold in Rotterdam, and the proceeds remitted to Buchanan. Pollok having died in 1811, his representatives raised an action of compt and reckoning against Buchanan, in which the inquiry arose, whether the profits accruing upon these several shipments belonged to Pollok's representatives, or to the house of David Buchanan? In support of this claim, they founded on various letters by Buchanan to Pollok, declaring that he could have nothing to do with the cargoes, as he could not lawfully join in the adventure, and stating that they must be at the risk of Pollok alone. To this it was answered, that

May 19, 1826. the letters were mere 'show' letters, or colourable documents, to evade the existing laws, and reference was made to the books in evidence of this allegation.

The Lord Ordinary remitted to an accountant, to report a just statement of accounts between the parties, pointing out the balance, if any, to be due to either of them. Thereafter his Lordship, on advising an interim report, pronounced a judgment (with a note prefixed, containing his views of the case), finding that Mr Buchanan had no right nor title to participate in the four adventures, by the vessels Mount Vernon, and Alonzo; sustaining the claims of the pursuers to the same, and appointing the parties to state, whether there was any difference between them upon the amount of the claim as sustained, and finding Mr Buchanan liable in the expenses attending the discussion of this point. To this judgment the Court, on the 26th May 1825, on advising petition and answers, adhered.*

Lord Robertson.—This is a question of fact, to be decided from letters and documents. At the time of these shipments, Buchanan was in London, and subject to the laws of this country, and, consequently, could not carry on trade with the Continent of Europe with any safety. Accordingly he wrote to Pollok various letters disclaiming all connexion with the goods, and making him aware that, if he embarked in these speculations, they must be bona fide on his own account. It is impossible not to be satisfied that in writing these letters Buchanan expressed his genuine sentiments, and that, if a loss had been sustained, they would have been sufficient to protect him against liability. These letters were received and acted on by Pollok, and it is clearly established that the shipments were made after he had received them. The defender, however, alleges that these letters were mere covers; and pleads, that although he would not then incur the risk of smuggling, because it was attended with danger, yet, now that is removed, he is entitled to avail himself of such an unlawful transaction. We cannot, however, listen to such a plea; and there is not only no evidence of his allegation, but it is contradicted by his own letters.

Lord Glenlee.—I have some doubts in relation to two of these adventures, which appear to me to have been made with the goods of the company, and without their sanction. It has been said, that if there had been any loss, it must have been sustained by Pollok alone; but if he made gain by means of the company's property, is the company not to participate in that gain,

* See 4 Shaw and Dunlop, No. 30.

because the partner has, by his own tortious act, exposed himself to a liability for the total loss. Any permission to take the goods of the company was limited to those shipped by the Mount Vernon, but did not apply to the others; and, therefore, he was just in the situation of a partner trading with the company's property, without permission to that effect, and consequently he is bound to account to the company. May 19. 1826.

Lord Pitmilly.—The burden lies on Buchanan of establishing his claim, because ex facie of the documents the goods belonged to Pollok. He says, however, that these were merely 'show 'letters;' but there is no evidence of this; and even if there was, it is not relevant, and could not be listened to. Besides, it is proved that the goods were purchased by Pollok from the company at the usual prices.

Lord Alloway.—In general, I concur with Lords Robertson and Pitmilly, although I am certainly affected by Lord Glenlee's difficulties. To a certain extent this is a question of fact, but there is also a difficulty in point of law. I doubt whether a merchant in this country can here validly make a claim, resting on that which was contrary to the law at the date of the existence of the claim. Mr Buchanan knew that trade by British subjects with the Continent of Europe was prohibited by the Orders in Council, and that he could not have entered upon these speculations without acting contrary to law; and therefore I doubt extremely whether (even if the facts had stood differently from what they do) such a claim could have been made effectual in our Courts. The facts, however, appear to me conclusive from the evidence which has been produced; and the allegation that the letters were mere 'show letters,' is directly contradicted. In point of principle there is the difficulty stated by Lord Glenlee; but I think it is made out that it was arranged that Pollok was to get the goods at the usual sale prices, and accordingly he charged them to himself at a higher price than he sold them to others.

Lord Justice-Clerk.—I am satisfied from the correspondence that Pollok alone was concerned in these adventures, and that Buchanan can as little claim the profit as he could have been called on for the loss. Prior to the date of these transactions, a system had been adopted to avoid Buonaparte's decrees; and this country, in retaliation of these decrees, had recourse to the Orders in Council. The danger of trading then became extreme, both the vessel and cargo being exposed to the risk of forfeiture. In these circumstances Mr Buchanan writes letters, declaring that he would have nothing to do with the

May 18, 1825. shipments, and that they must be bona fide on account of Pollok. It is impossible to regard them as colourable documents. The full price was paid by Pollok for the goods, and therefore he cannot be accused of appropriating the company funds, and speculating with them on his own account.

Buchanan appealed.

Appellant.—The letters on which Pollok's representatives found, were written solely as a disguise to prevent condemnation in case of capture;—a device warranted, and in common practice, in consequence of the peculiar state of the commercial relations of the belligerent powers. In point of fact, these shipments were made with company tobacco, for the company account; and had a loss incurred, Buchanan must have borne his share. No doubt, it was not a trade that Buchanan would have chosen, had a choice existed, which explains many of the expressions in the correspondence; but he was forced to adapt his measures to the complexion of the times. Pollok was quite sensible that the house of David Buchanan were concerned in these risks, and evidence that the shipments were on account of the company, is to be found in the company books, and in the fact, that on sundry adventures of this very kind 'David Buchanan's' interest is admitted. He was an American citizen as well as Pollok; at all events, Pollok has no title to make the objection.

Respondents.—The four shipments in question were made to the continent by Robert Pollok, on his own risk, and on his own account, not only with Buchanan's sanction, but after Pollok had been expressly and anxiously prohibited by Buchanan from making any such shipments on the Company's account. At that time, in consequence of the Orders in Council, and the influence of the Emperor of France, it was illegal in a British subject to trade to Holland, which was an enemy's country, and consequently illegal to make shipments to Rotterdam; for this reason Buchanan had declared he would on no account be concerned in any trade of that kind, and that such shipments, if made, must be exclusively at Pollok's risk, and bona fide his property. Accordingly, on receiving advices of such shipments on Pollok's account, Buchanan expressed his satisfaction that he had no interest or share in them, and that they were on the account, and solely at the risk, of Pollok. But although it had now turned out that the shipments had been prosperous and productive, Buchanan could not claim a share, but was bound to account for the whole to his deceased partner's representatives; and in

support of this they referred to the correspondence and books of accounts of the parties. Besides, it was clearly an illegal traffic with regard to Buchanan; he could not claim any of the profits. May 19, 1826.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

LORD GIFFORD.—My Lords, the question in this case is a mere question of fact, which I cannot but regret that your Lordships should be called on to decide. The appellant in this case, and the two gentlemen named, Robert and Allan Pollok, were merchants in Virginia, carrying on trade in partnership together. One branch of the business was conducted in London, under the immediate management of the appellant. Another was established in Petersburg, in Virginia, under the firm of Buchanan and Pollok, and was managed by Robert Pollok. The company had also an establishment at Richmond, in Virginia, under the firm of Robert and Allan Pollok and Company, managed by Allan Pollok; and lastly, they had an establishment at Manchester, in Virginia, originally under the firm of Robert Pollok and Company, and afterwards under that of Pollok, Tredway, and Company, which was managed by Mr Tredway, who was a partner in this last branch.

It appears from these most voluminous proceedings, that, antecedent to the year 1806, the partnership had been engaged in commercial speculations in the name of the American house, consigning to ports in France and Holland the goods which were shipped; but it being discovered that by reason of Mr Buchanan being a resident in Great Britain, such transactions with the enemy were illegal, and that the cargo was liable to seizure, Mr Buchanan, in the year 1806, declined, in a correspondence to which I shall be obliged to advert, having any concern in such shipments in future. My Lords, after that period, three shipments were made on board the Mount Vernon, one in the month of April 1806, another in the month of November 1806, and the other in the month of July 1807; another in the month of July 1807, was made on board a ship called the Alonzo. All those shipments were finally destined to Rotterdam, where the cargoes were disposed of, and a question has arisen in these proceedings, respecting the manner in which the profits arising from those speculations are to be divided in account, that is to say, whether Mr Buchanan is a partner in the concern, and is entitled, as such partner, to a share in the profits of these adventures; or whether, in consequence of the effect of this correspondence in 1806, and the subsequent years, between him and Mr Pollok, they are not to be considered as the sole adventures of Mr Pollok, he being, on the one hand, to be considered as solely entitled to the profit, and, on the other, solely liable for the loss which might accrue from these adventures.

My Lords, it appears that Mr Robert Pollok died in the year 1811, and after his death, differences arising between his representatives and Mr Buchanan, respecting the partnership accounts, the respondents brought

May 19, 1826. an action of count and reckoning against Mr Buchanan. Mr Buchanan then raised a process of multiplepoinding against the representatives of Mr Pollok. The two actions were afterwards conjoined, and in that conjoined action the question I have stated to your Lordships arose.

The case came before the Lord Ordinary in the year 1824. I should, however, state, that some time before it came on for adjudication, a reference was made to an accountant on the nature of the accounts, the accounts kept by Mr Pollok in America, and Mr Buchanan in England—whether, from the nature of those accounts, any conclusion could be satisfactorily drawn. The result of the accountant's opinion was, that looking at those accounts, he considered those four adventures as the sole adventures of Mr Pollok, and that there was nothing in those accounts which fairly militated against such a conclusion. On the case coming before the Lord Ordinary, after that report had been made, he pronounced an interlocutor, accompanied by a very elaborate note, detailing the ground of his opinion. (Here his Lordship read the interlocutor.)

That opinion of the Lord Ordinary was brought under the review of the Court of Session, and after a very anxious and patient consideration of this subject, going through papers which embrace, as the Lord Ordinary states, no less than 990 pages of correspondence, they were all of opinion, and delivered their opinions at great length, that the conclusion drawn by the Lord Ordinary was right. One of the learned Judges seems to have entertained doubts with respect to the two last adventures, viz. the third voyage of the Mount Vernon, and the adventure by the Alonzo. Some of the other Judges seem to have been in some measure impressed with the doubts expressed by that very learned and able person, but the result of their determination was, that the Lord Ordinary's conclusion was right.

My Lords, this case has been brought by appeal before your Lordships, and it was very ably and very elaborately discussed at your Lordships' bar. I intimated, at the conclusion of that argument, that, notwithstanding the great bulk of those papers, and the mass of correspondence which has taken place between these parties, I considered it to be a duty to your Lordships that I should myself examine more attentively than I could do while the case was under discussion in your Lordships' House, that correspondence. My Lords, I have so done, and I will now state to your Lordships the result of the consideration which I have given to this case.

As I have already stated to your Lordships, anterior to the year 1806, it is undoubted that these persons had been engaged in illicit (as it regarded Mr Buchanan) adventures to the continent. We were at that time at war with Buonaparte, who was at that period in possession of that part of the continent to which these adventures were sent. Mr Buchanan discovered the peril that was run by those adventures, and, knowing that they were liable to seizure as British goods, and that, if seized, and it was discovered that any of the persons engaged in those adventures resided under the protection of Great Britain, they would be liable to forfeiture, he became alarmed; and he was the more so particularly with respect to the ship

Mount Vernon, which belonged to Mr Pollok; he conceiving that there might be doubts entertained, in case of a capture, whether she was an American ship, which was an additional reason for caution. May 19, 1826.

In consequence of this impression, he, in the month of March 1806, wrote letters to Mr Pollok, then resident in America, expresely disclaiming any participation in the shipment which was then about to be made in the Mount Vernon for the Continent, and expressing generally his disinclination in future to be concerned in any such adventures. (In evidence of this, his Lordship read a letter from Mr Buchanan, of the 13th of January 1806.)

My Lords, I observe that in the Court below it seems at one time to have been contended, on the part of Mr Buchanan, that these letters were not to be considered as expressing the real sentiments of the writer, but that they were written to be produced in case of necessity, in order to cover the illegality of these transactions. But, my Lords, I do not think much stress was laid upon that circumstance at your Lordships' bar, nor do I think much stress could be laid upon it. These were private letters between Mr Buchanan and Mr Pollok, and I think it impossible to say that they did not express that which was at that time the real intention of Mr Buchanan. It appears evidently that he was resolved, at that time, to disentangle himself from any participation in any adventure to the Continent, in respect of any cargo sent in this vessel, the Mount Vernon.

My Lords, in a second letter, of the 22d of January, he expresses himself as follows: 'You, on account of your residing in America, are an 'American, therefore all shipments made to the Continent should be made 'in your own name, and, bona fide, your own property. The shipments 'per Brutus and Alliance are, I hope, wholly on your own account, at 'least, I must declare that I will have no concern in them. I have to 'desire you will make no shipments whatever to France; but as a cargo to 'Holland may do in the spring, you may ship a cargo to Falmouth, and a 'market, pretty early, if the price is moderate, and you cannot sell to your 'mind; but this cargo ship in your own name, and make an actual purchase 'of it at the bill price, and charge yourself with it on the books accordingly, so that the profit or loss may be your own, together with that of the 'other partners in America, as all my object is to get a remittance.'

After this, as I have stated to your Lordships, a shipment was made on board the Mount Vernon for Holland; and it appears from the correspondence, that that shipment certainly was at the time considered as having been made by Mr Pollok on his own account, and not on account of this partnership. (In support of this, his Lordship here read letters of Mr Pollok of the 22d and 28th April 1806.)

My Lords, other letters follow, with which it is unnecessary for me to trouble your Lordships; but in which the same expression, or singular expressions, occur, particularly a letter written to Mr Pollok, on the 5th of June 1806, in which he says, 'I notice the cargo of the Mount Ver-'non is entirely your own, which is so far well; as on no account would

May 19, 1826. 'I wish to be concerned in any cargo going to the Continent, and the Con-'tinental market only is what would suit a cargo shipped at this season.' And in a subsequent letter, he expresses his determination, that he will not in future be concerned in any cargoes, except those which are consigned to a British port.

My Lords, a second shipment was made by the Mount Vernon, in the month of November, in the same year 1806; and upon that occasion, when the shipment was made, Mr Pollok advised Mr Buchanan that he had shipped on his own account 81 hogsheads, and the shippers from James Rivers 105 hogsheads. On the 26th of November, he also advised Mr Buchanan, that being unable to procure a charter for the Mount Vernon, he had sent her for freight to Rotterdam, procured 320 hogsheads for freight from sundries, and had determined to fill her up himself by a shipment of 81 hogsheads.

After that, in the month of July 1807, a third shipment was made on board the Mount Vernon, and also a shipment on board the Alonzo; with respect to the Mount Vernon, similar correspondence took place as with respect to the previous voyages. In a letter from Mr Pollok to Mr Buchanan, that the shipment was on his own account, he says, 'The Mount 'Vernon will also be a full ship by Saturday, and immediately proceed 'on her voyage to Rotterdam, having on board, for my account, subject 'to your control, 150 to 160 hogsheads of tobacco.' And with respect to the Alonzo, he writes that he had shipped on board 395 hogsheads on his own account. 'And, my Lords, there is a private letter, written by Mr Buchanan himself to his clerk, which has been referred to in the papers, (I do not find that it has been referred to in the judgment of the Learned Judges,) in which he speaks of the tobacco as being entirely Mr Pollok's, and the remainder of the cargo as belonging to Messrs Stotts. Your Lordships will also find, by a letter written by Mr Pollok to Messrs Warden and Sons, of 17th of September 1807, respecting a shipment then about to be made; he says, 'If shipped, the whole must be 'for the account of the writer, as though we be all American subjects, 'still as David Buchanan's residence is in England, by an agreement 'amongst the partners, all Continental shipments are at the exclusive risk 'of Robert Pollok.' This, as your Lordships will perceive from the date of the letter, was after the shipments by the Mount Vernon.

Now, my Lords, looking at this correspondence, I have asked myself this question: Supposing these adventures, instead of being fraudulent, had been legal adventures, could Mr Robert Pollok, after this correspondence, and after the express notice given to him by Mr Buchanan, that he would not be concerned in any one of them, claim against Mr Buchanan any part of the loss, that gentleman having expressly stated to him, that if such shipments were made by him, they must be made on Mr Robert Pollok's own account; and for the reason assigned by Mr Buchanan, which I should apprehend was a reason that would apply to a man of morality, that in case of capture he should be enabled to swear and to depose upon his oath, that the shipments were upon his sole account,

which, if Mr Buchanan was interested in them, it was impossible that he could do? Looking at these circumstances, my Lords, if a loss had ensued upon these adventures, could Mr Pollok, in the face of his correspondence, and after what had taken place between these parties, say to Mr Buchanan, Although you did desire me to ship upon my own account, although the shipments were made in my own name, although you directed they must be bona fide in my own name, it was covertly intended you should be concerned in those shipments, and I therefore call upon you to contribute—My Lords, I ask whether it would have been possible for Mr Pollok, under these circumstances, to fix Mr Buchanan with any part of the loss? I apprehend certainly not; and if he could not, then it is difficult to see how Mr Buchanan can claim a share of the profits. May 19, 1828.

But then it is said, you must look at the accounts which were kept at the time of this correspondence; and if you look at the accounts kept in London, whatever is the state of those kept by Mr Pollok, Mr Buchanan kept them as the accounts of a general speculation. Certainly, that is not so with respect to the three first adventures, which appear to have been kept in rather a different manner. With respect to the American house, it is quite clear that Mr Pollok kept those accounts differently from those of a joint speculation. My Lords, I should be sorry to venture myself to decide upon the nature of those accounts. The Court of Session had a difficulty in drawing a conclusion upon them, and they therefore referred them to a very intelligent accountant. He investigated these accounts, and produced an elaborate report to the Court of Session. What the result of his consideration of those accounts was, I have already stated to your Lordships—that they were not adverse to the claim set up by Mr Pollok, but were perfectly consistent with it—that they were more consistent with the notion that Mr Pollok was the person solely interested in these adventures, than that they were joint speculations. Upon the result, therefore, of these accounts, and upon the result of this correspondence, to which I have already adverted, the Court of Session, after, I would say, what appears to be a most anxious and careful examination of this correspondence, pronounced a judgment confirmatory of the very elaborate view taken of this case by the Lord Ordinary, before whom the case was heard, and who, as I have already stated to your Lordships, pronounced a very long judgment, explaining the grounds on which he came to this conclusion;—the Court adopted that view; and your Lordships are called upon to grant (if I may use the expression) a new trial upon this subject. In considering whether your Lordships will grant a farther inquiry into this subject, I apprehend it is the duty peculiarly of myself, whose assistance your Lordships have upon this occasion, to examine attentively the evidence given in the case, and to ask myself this question, whether the result of that evidence satisfies me that the Court of Session have come to a right conclusion, or whether it left the matter so much in doubt as that your Lordships should direct a farther investigation? My Lords, I am the more anxious upon the case, because it was represented at the Bar (as I believe the fact to be) that the deci-

May 19, 1826. sion of this case involves a very considerable sum in point of amount; that the profits of these adventures amount to several thousand pounds; and that, therefore, it was a very material circumstance as affecting Mr Buchanan's rights with regard to this partnership.

My Lords, that rendered it a most anxious duty on my part to satisfy myself upon the subject. I can only say, that I have endeavoured to do so with the greatest care. I have read through what your Lordships will perceive to be an immense body of correspondence upon this subject, and I have endeavoured to understand the nature of the accounts.

I ought in the case, however, to state, that one argument used at your Lordships' bar was, that, assuming this to be so in the correspondence, and assuming it to be so in the American accounts, yet Mr Buchanan had transmitted his accounts to America, and therefore it ought to be presumed that Mr Pollok assented to the mode in which those accounts were kept. Mr Pollok, as I have stated to your Lordships, died in the year 1811; but it is alleged, that, during his lifetime, he was fully aware of the nature of this account, and that he does not appear to have made any objections, and that, therefore, he must be taken to have assented to the manner in which Mr Buchanan stated this account. Upon that part of the subject, however, I think there is some little obscurity in this case. But, my Lords, whatever might have been the accounts transmitted by Mr Buchanan, unless it can be shown, that, after that account had been so transmitted, there was an express acknowledgment, with a full knowledge of the circumstances, on the part of Mr Pollok; that although he had engaged in those speculations, under the faith of those letters, made the shipments in his own name, and was therefore entitled to the whole profit; unless it can be distinctly and clearly shown that he had expressly assented after the adventure had been made, and the sales had taken place, to an alteration in the nature of his engagements with his partner; and unless it be made out on the face of this correspondence that there was an intention to let Mr Buchanan into a participation of those profits, I do not think the case, on Mr Buchanan's part, is made out. My Lords, looking as I have done at the immense body of correspondence, and the various circumstances, and after a consideration of the arguments in this case, far be it from me to say this was not a case of difficulty and perplexity, and requiring a great deal of attention, on the part of your Lordships, before you came to any definite conclusion upon the subject; but I am satisfied upon it, so far as my humble endeavours have gone (and I can pledge myself that I have endeavoured to make myself master of the case), and, after an attentive consideration of the circumstances of this case, I must confess, that I am unable to come to a different conclusion from that at which the Court of Session arrived. I do not think there are sufficient circumstances in this case by which to distinguish the last cargo by the Mount Vernon and the cargo of the Alonzo, always bearing in mind that the case is weaker with respect to those two cargoes than to the two former; but looking to the correspondence, not only the correspondence which took place upon the subject of those two adventures, but the whole

of the correspondence, it is clear that Mr Pollok considered those as made upon his own account. I am unable to come to a different conclusion from that to which the Court of Session arrived with respect to either of those cargoes; and therefore, after a most attentive consideration of the case, I am of opinion that I ought to advise your Lordships to affirm the judgment of the Court below. The case must be remitted back to the Court of Session to proceed farther, as there is one question still open in the taking those accounts. May 19, 1826.

My Lords, in this case I do not feel that I can advise your Lordships to give any costs. As I have already said, the evidence is strongly in favour of the conclusion to which the Court of Session arrived: but considering the complexity of the case, and the difficulty of it, I should advise your Lordships simply to affirm the interlocutors complained of, and to remit to the Court of Session to proceed therein as they shall think fit.

J. RICHARDSON—A. MUNDELL—Solicitors.

ADELIZA STRUTHERS and Others, Appellants.—*Robertson—Sandford.*
JOHN BARR, Respondent. No. 17.

Society—Circumstances in which it was held ex parte (reversing the judgment of the Court of Session), that the extent of the interest of a partner in a company, where this was not fixed by contract, was not to be regulated by the amount of his input stock, as compared with that of the other partners, but that he was to be held as having an equal share.

May 19, 1826.
1st DIVISION.
Lords Craig and Alloway.

IN 1792, John and James M'Ilwham, Alexander Spiers, and Robert Barr, formed a copartnery for the purpose of spinning cotton yarn at Crosslee, in Renfrewshire. The capital stock, the appellants stated, was fixed first at £4000, and afterwards at £5000, which was to be advanced in equal parts by the partners, and it was said each partner was to hold one third share. There was, however, no written contract.

Innumerable disputes occurred between Barr, who had been intrusted with the active management, and his partners, which it is unnecessary to detail—a heavy loss was incurred—Barr was removed from the management—the mills were sold—and mutual actions, at the instance of the different parties, were instituted in the Court of Session in 1798. The principal question which occurred related to the extent of Barr's interest in the concern, and his consequent liability for the loss. He had advanced £1300 (which his partners maintained was less than the amount

May 19, 1826. of his stock, and much less than what they had contributed); and the proportion which he or his representatives had a right to reclaim of this input, would depend on the amount of the share he held. Lord Craig, as Ordinary, remitted to an accountant; and, on advising his report, found 'that Robert Barr 'must be held to have had a full third of the stock of the Crosslee 'Company in question, there being no evidence that his share was 'less; and, therefore, upon the supposition that there has been a 'loss sustained by that concern, found that he must be subject-'ed in one third share or proportion thereof;' and appointed parties to state, whether there had been a loss, and to what extent. The Court, however, on the 28th of January 1806, recalled the Lord Ordinary's interlocutor, and found that Barr was 'to be held a partner of profit or loss down to the dissolu-'tion by the sale of the works, only to the extent of the stock 'paid in by him, compared with the input stock of the other 'partners,' and remitted to the Lord Ordinary to proceed on these data. Lord Alloway, as Ordinary, then pronounced an articulate judgment upon the claims of the parties; but thereafter, 'in respect that this process has depended in Court since 'the year 1798, and from the delays in the proceedings, it seems 'hardly possible to bring it to a conclusion in the Outer-house, 'appointed informations to the Inner-house.' Ultimately, the Court, on the 23d February 1821, held that a loan of £350, made originally to the concern in the name of Robert Barr and Company, was to be accounted a part of Robert Barr's input stock; found Barr entitled to £35 of damages for want of a house—that he had no claim to damages, on the allegation that the company was dissolved intempestivè—that he was entitled to a certain salary—that of an outlay on the works and machinery, a proportion, applicable to repairs and keeping of the mill and machinery, fell to be stated as a proper expenditure of the company; but that what regarded the erection of new and additional buildings or machinery, was chargeable only against the other partners;—and as to a claim of commission of three and a half per cent, found it a regular charge upon such goods as were sold upon credit to strangers; but disallowed it on such sales as were made for ready money, or to partners of the company themselves, reserving the parties to be heard on a claim for a lesser rate of commission on sales to strangers for ready money —disallowed Barr's claim for the current insurance, the purchasers being entitled to it,—and to the manufactory bell, it being a fixture of the mill and machinery—and, in general, remitted

to the Lord Ordinary to apply these findings, and to inquire into the facts on which they depended. May 19, 1836.

Thereafter, the Lord Ordinary made another remit to an accountant, and decerned for £423, 5s. 2d. of principal, and £84, 4s. 1½d. of interest, in favour of Barr. On a petition, the case was of new remitted to the accountant, and, on resuming consideration of the petition and report, the Court adhered, and found the petitioners liable in the expenses of opposing the petition, and those attending the additional report of the accountant;* and thereafter, having granted leave to appeal, Struthers and others, representatives of M'Ilwham, one of the partners of the Croslee Company, appealed. John Barr, representative of Robert, made no appearance, and the case was in consequence heard ex parte.

Appellant.—The presumption of law is in favour of equality of interest, and this presumption is fortified by the documentary evidence in the case. It is not true, that there is evidence in the correspondence between the parties that a new arrangement was entered into. The rate of commission was inadequate, and the claim of damages unfounded.

The House of Lords ordered and adjudged 'that Robert Barr 'ought to be held to have had an interest to the extent of one 'third in the partnership concern, and to have been liable to that 'extent in the loss sustained therein; and it is ordered, that, with 'this declaration, the cause be remitted back to the Court of Ses-'sion in Scotland.'

Lord Gifford.—In this case of Struthers *v.* Barr, I will detain your Lordships but for a few minutes. No person appeared at your Lordships' bar to support that part of the judgment of the Court below, which is appealed against. In consequence of that, I certainly felt it my duty more particularly to attend to the circumstances of this case; because although no person appeared on the part of the respondent, your Lordships ought to be clearly satisfied that the judgment was wrong, before you could be induced to alter or vary that judgment.

In this case the question is one merely of evidence. It appears that a Mr Robert Barr, in conjunction with two persons of the names of James and John M'Ilwham, and a gentleman of the name of Spiers, entered into copartnership in the year 1792, at Crosslee, in Renfrewshire, for the purpose of spinning cotton yarn. I think it must be taken without doubt, when these parties entered into copartnership, that each of the

* 1 Shaw, No. 156, 4 Shaw and Dunlop, No. 97.

May 19, 1826. partners were to have equal proportions in the concerns. No contract of copartnership was ever executed between these parties. Originally the capital was fixed to be £4000, to which they were to contribute. They obtained a grant in feu-farm of a place called Crosslee, with houses and other buildings, on which this concern was to be carried on. It appears that although scrolls had been prepared, on which a deed of copartnership was to be founded, they went on with the concern as I have stated, from 1792 until 1798, without any deed of copartnership being executed. Then disputes arose between the parties, and I regret to be under the necessity of stating, that from the year 1798, to the period at which I am now addressing your Lordships, these parties have been in litigation in the Court of Session. When I said these parties, I should explain that several of them are dead. Mr Barr is dead, and several of the others. Several actions were brought, and they dissolved the partnership in 1799. A suit was instituted to obtain a contribution for losses sustained, and I regret to state to your Lordships, that interlocutors to the amount of twenty-three have been pronounced by the Court of Session. The last interlocutor, in fact, exhausts the whole case; but in order to remove any doubt which the respondent might state to the competency of an appeal in the present stage of the proceedings, leave was obtained to appeal against that last interlocutor; and the appeal has accordingly been brought before your Lordships. The main question upon this appeal is with respect to the extent of interest which Mr Barr had in this copartnership. The Lord Ordinary before whom the cause originally came, namely, Lord Craig, was of opinion that Mr Barr must be held to have had a full third share of the stock, there being no evidence that his share was less, and therefore was to be liable to a similar proportion of the loss; but that interlocutor coming before the Court of Session, they differed from the Lord Ordinary; and in a similar manner as in that case of Buchanan *v.* Morris, which your Lordships had before you this morning, and in which a long correspondence occurred, the Court of Session thought, upon looking to the whole of the correspondence, and as no articles of partnership were executed, the result was, that Mr Barr was to be considered a partner only to the extent of the capital contributed by him; and he not having contributed a third, his profit and loss were only to be proportionable to the share which he had actually contributed, and therefore they 'find the petitioner is to be held a partner of profit and loss down to the 'dissolution by the sale of the works, only to the extent of the stock paid 'in by him, compared with the input stocks of the other partners.' Upon that basis a great variety of subsequent interlocutors proceeded, and which are appealed against to your Lordships, and also certain of the interlocutors pronounced upon the subject of an allowance of commission on the accounts, which they say was inadequate, but which I need not trouble your Lordships with, because there was not much said upon it at the bar, and I do not think that upon that part of the case there is any ground to differ from the judgment pronounced by the Court of Session.

The remaining question is with respect to the extent of interest which Barr had in the concern. It appears evident, that in the outset, he was

to have an equal share; they were each to contribute one-third of the capital. In the years 1796 and 1797, disputes arising between these parties, it does appear, in the correspondence which took place, that certain propositions were made by Mr Barr, in order to settle matters to this effect; that if they would not consent to let him have a third, he would be content with a share in proportion to the capital advanced by him. Though no answer appeared to those propositions, and though I think it is clear they were not receivable, the Judges thought the parties ought to be considered as having assented to them. But, my Lords, in the course of the proceedings, I observed that Mr Barr himself brought an action against the other parties, Alexander Spiers and John and James M'Ilwham, for the purpose of compelling them to execute and subscribe a regular contract of copartnery. I requested to see the summons in that action, because it did occur to me, that if Mr Barr himself, in the year 1799, in that action, insisted that the copartnership ought to be carried into execution upon the terms of the original agreement, and if I found that the original agreement was that they were to have equal proportions in the concern, it would be a very strong thing to say, he having asserted that he was interested to the extent of one-third, that he was only interested in proportion to the extent of the capital originally advanced. That summons, my Lords, has been furnished to me; and I observe, that, in the summons, it set forth what I suppose was an agreement between the parties, and in which he claims to have an interest to the extent of one-third. However, in whatever way originally the partnership might have consisted, the Court of Session held that his share should be according to his stock; but I do not find in the correspondence in the cause, which I have looked through very attentively, at least those portions of it to which reference has been made, anything which tends to such a result. I think it amounts to no more than this, that when the parties were quarrelling among themselves, Mr Barr made several propositions, but which propositions so made were never carried into effect. Then, my Lords, in this summons I find him claiming one-third; so that it does appear to me, that the decision pronounced originally by the Lord Ordinary was right, and in which one of the learned Judges afterwards concurred, whereas the Court have held, that looking at the whole of the case, they ought to conclude that Mr Barr consented to reduce his share in proportion to the whole capital. After looking through this correspondence, and considering the whole of the circumstances in the case, it does appear to me that the appellants have been right in asking to vary the decision to that extent. May 19, 1836.

I have already stated to your Lordships, that in consequence of no one appearing on the part of the respondent, it is peculiarly my duty to advise your Lordships to take care to see that the judgment is wrong before any alteration is made in it. There are various circumstances why the parties might not appear—the expense, and other reasons might operate upon them. At the same time, looking at the correspondence between these parties, and the facts of this case, I am compelled to come to the conclusion, that nothing sufficiently satisfactory appears to show that the

May 19, 1826. parties had definitely altered the relative situation in which they stood; and which, according to their original contract between them, entitled each party to one-third interest in the concern. Therefore I should propose to your Lordships in this case to declare, that Robert Barr ought to be held to have had an interest in this concern to the extent of one-third, and consequently to be liable to that extent for any losses that may have been sustained therein; and that your Lordships should order that the case be remitted back to the Court of Session, with such a declaration.

SPOTTISWOODE and ROBERTSON.—Solicitors.

No. 18.

MURDO M'KENZIE, Appellant.—*Adam—Robertson.*
GEORGE SUTHERLAND, Respondent.—*Keay—Murray.*

Possessory Judgment—Salmon Fishing.—Two opposite heritors on the banks of a river, having each right to one half of the salmon fishing, and having exercised it for more than seven years by one and the same tenant, Held (affirming the judgment of the Court of Session), that a tenant who had so enjoyed that possession by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one-half share to another tenant.

May 19, 1826. 1st DIVISION. Lord Eldin.

THE water of Cassley falls, at almost right angles, into the Kyle of Oykell, or upper extremity of the Dornoch Frith. On the west lie the lands of Inner Cassley, belonging to Sir Charles Ross, Bart. of Balnagown, whose title-deeds give him a right to one-half of the salmon-fishings in the Cassley, and to the whole of the salmon-fishing in the Oykell. On the east bank of the Cassley lies the estate of Rosehall, liferented by Lady Ashburton, whose titles give her one half of the salmon-fishings in the river Cassley, but do not convey to her any right of fishing in the Oykell. On Lady Ashburton's side of the river, Sir Charles Ross is proprietor of two pendicles of ground, (which are afterwards referred to as Nos. 1 and 5 of a plan,) the one of which extends a considerable way along the bank of the river, and the other, although of smaller dimensions, holds a similar position. He is besides proprietor of two small islands situated at the mouth of the Cassley, and at its junction with the Oykell. These are denominated by the Nos. 2 and 3. From the nature of the banks it was scarcely possible to fish in the Cassley on Lady Ashburton's side, except on these pendicles of ground and islands, so that the proprietors had found it necessary to let the fishings to one and the same tenant. Accordingly, the tenant had been in the practice for upwards of forty years of exercising the right of fishing indiscriminately on both sides of the river, and parti-

cularly on the pendicles belonging to Sir Charles Ross, and on the islands at the mouth of the river, and he paid one half of his rent to each of the proprietors. May 19, 1826.

In 1814, Sutherland became tacksman of these fishings on the Cassley, and continued to fish in the same manner as his predecessors had done. He remained tacksman until 1820, when M'Kenzie, who had acquired the salmon-fishings in the Kyle of Oykell and in the river Oykell, in tack from Sir Charles Ross, also obtained from him a lease of his one-half salmon-fishing in the Cassley.

This separation led to disputes as to the extent of the respective rights of the tenants. Sutherland, as before, drew his nets upon the west side,—on the pendicles on the east side belonging to Sir Charles Ross,—and on the islands. This proceeding M'Kenzie challenged by a petition to the Sheriff of the county of Sutherland, and prayed the Sheriff 'to interdict, prohibit, and 'discharge the said George Sutherland, and all others on his ac-'count, or for his behoof, from fishing, drawing, or fixing nets in 'any part of the estate of Balnagown along the waters of Cass-'ley and Oykell, or other rivers on the said estate.' After some procedure, the Sheriff, 'in respect it is admitted by the respond-'ent, George Sutherland, that previous to the year 1820, he pos-'sessed the Rosehall and Balnagown fishings in the river Cas-'sley jointly, and that it was only since said period that he has 'had a separate possession of the Rosehall fishings, distinct from 'Balnagown, found, that he is not entitled to a possessory 'judgment in virtue of his said possession of the Rosehall fish-'ings; and therefore granted the interdict as craved against fish-'ing or drawing nets on the Balnagown grounds, and prohibited 'and discharged the said George Sutherland and all others con-'cerned accordingly: reserving to the parties interested to as-'certain and establish their respective rights of fishing on the 'said river Cassley before the competent Court, as accords.'

Against this judgment Sutherland presented a bill of suspension to the Court of Session; and the Lord Ordinary remitted to the Sheriff of Sutherland 'with instructions to recall his inter-'locutors against the complainer, and to find that the complainer 'is entitled to a possessory judgment, and to assoilzie him from 'all the conclusions of the respondent's petition.

M'Kenzie then reclaimed, and contended that there were no termini habiles for a possessory judgment, seeing that it was not pretended that the possession of any part of Sir Charles Ross's lands had been held otherways than by virtue of a lease from him, which was now at an end. On the other hand, it was contended by Sutherland, that as the proprietors had by themselves

May 19, 1826. or their tenants exercised a joint possession for upwards of forty years, he was entitled to the benefit of a possessory judgment.

The Court, on the 5th February 1825, remitted to the Lord Ordinary to remit to the Sheriff of Sutherland, with instructions to find the suspender entitled to a possessory judgment as to the fishings on the Cassley, at the points No. 1 and 5 of the plan (the two pendicles belonging to Sir Charles Ross, on the east side), and on Sir Charles Ross's lands on both sides of the river —also on the islands No. 2 and 3,—and on the banks on the north side of those islands; and thereafter adhered.*

Lord Balgray.—The proper question here is, what possession are these parties in the circumstances of the case entitled to? In point of law, mere possession of itself is not sufficient; there must also be a sort of title. Here there was a joint tacksman for a long time, but there is no evidence as to what the nature of the possession was prior to that time. I think that a proof should have been allowed, so as to have ascertained this; and that Sutherland should draw his nets on his own side only, till that is investigated.

Lord Hermand.—We have nothing to do with the prior rights of these parties. We have to judge of a possessory question. There was a long possession on a joint tack, which I apprehend is a good title in this question. Sufficient has been already established to show that the respondent is entitled to a possessory right.

Lord Gillies.—There are here distinct and separate titles, giving to each of the parties a right to one half of the fishing. The question is, How is that right to be exercised? I apprehend that this must be decided by the state of the possession, and that we must be regulated by the possession which was held under the joint tack. If so, then the interlocutor is clearly right.

The other Judges concurred.

Mackenzie appealed.

Appellant.—Possession, while the same tenant had both fishings, was no ground for a possessory judgment. Sutherland could not ascribe his possession to the lease of the Rosehall half of the fishings, more than to the Balnagown half; for, assuming that he and his predecessors used both banks of the river, as he and they were in right of both fishings, no prescription could run in favour of one and against the other fishing. Each proprietor could only draw on his own land.

* See 4 Shaw and Dunlop, No. 230.

Respondent.—The subject the respondent possesses, and formerly possessed, is the joint and promiscuous right of fishing in the Cassley with the family of Balnagown; and having so possessed for more than seven years, he is entitled to a possessory judgment. There was no intermission that can affect this privilege; and even if the possession had not endured for seven years, melior est conditio possidentis. As the whole land on both sides, at the only points where the water can be fished, belonged to one proprietor, the tacksman was entitled to draw on them, though the tacksman only of the other proprietor; and, accordingly he had constantly and exclusively drawn on the west side. He pretended to no right to fish in the Oykell or any of the 'other rivers;' but the islands at both the north and south points were in the Cassley, and, as such, had been fished round and drawn upon by the Rosehall tenants for more than seven years. May 19, 1826.

The House of Lords ordered and adjudged that the Interlocutors complained of be affirmed.

LORD GIFFORD.—My Lords, there was a case heard before your Lordships, in which Murdo M'Kenzie, tacksman of the salmon-fishing belonging to Sir Charles Ross, Bart. is the appellant, and George Sutherland, a fisherman at Auchness, in the county of Sutherland, is the respondent. My Lords, the question in this case is, the right of salmon-fishing in one half of the fishings in the Cassley. My Lords, the estate of Rosehall, which belonged to the late Lord Ashburton, and the estate of Balnagown, which belongs to Sir Charles Ross, lie on the banks of the water of Cassley, which is a small brook, running from north to south, and falling into the Kyle of Oykell. The river Oykell runs from west to east; and not far from its mouth, in the Kyle, on the north bank, is the fishing of Lutach, belonging to Sir Charles Ross. The appellant, in this case, is the tenant of Sir Charles Ross, of his moiety of the fishing of Cassley, and the fishing in the Oykell, as well as of the fishings in the Kyle of Dornoch. The respondent is the tenant of Lady Ashburton, of her moiety of this salmon-fishing belonging to her estate of Rosehall. It appears, my Lords, that the estate of Rosehall adjoins the east bank of the river, and that Sir Charles Ross's estate of Balnagown lies chiefly on the west bank, but where, as it is alleged, the situations are most advantageous for fishing. Sir Charles Ross's estate of Balnagown is situated on both sides, and he is also the proprietor of two small islands at the mouth of the Kyle.

It appears that prior to the year 1820, and as it should seem almost as far back as memory can go, the joint proprietors of this fishing—the proprietor of the estate of Balnagown, and the proprietor of the estate of Rosehall—concurred in letting the entire fishery to the same tenant; and as they considered themselves equally interested in the fishery, the rent was always reserved payable in equal moieties to these two proprietors. During the year 1814, the respondent, Mr Sutherland, became the tenant

May 19, 1826. of the whole fishery of Sir Charles Ross's predecessor, and Lord Ashburton's; but in the year 1820, Mr M'Kenzie, the present appellant, obtained a tack of Sir Charles Ross's fishery in the Cassley, and other fisheries belonging to him.

In consequence of this separation of the interests of the salmon-fishery in the Cassley, disputes arose between the appellant and the respondent; the respondent contending, that, as tacksman of the moiety of the fishings on the water of Cassley, he had a right to draw his nets on the lands of Balnagown, which was disputed by the appellant. The consequence was, that the appellant, in the year 1822, presented a petition to the Sheriff of Sutherland, stating 'that the whole fishings belonging to the estate of Balnagown, in the waters of Oykell, Cassley, and elsewhere, were let in lease to the petitioner (the said Murdo M'Kenzie) at the term of Martinmas 1819: from which date he has held the whole exclusive right thereto; but notwithstanding thereof, George Sutherland, tenant at Auchness, did, at various times in the course of last year, forcibly fish and draw his nets on the said lands and fishings of Balnagown, set as aforesaid to the petitioner; and the said George Sutherland further threatens to repeat his encroachment this year, 1822, unless prevented.' He therefore prayed the Sheriff to grant warrant of service, with an order for answers; 'and in the meantime to interdict, prohibit, and discharge the said George Sutherland from fishing, drawing, or fixing nets in any part of the estate of Balnagown, along the waters of Cassley and Oykell, or other rivers on the said estate.'

My Lords, the respondent, in this case, set up no claim whatever to fish in the Oykell, and other rivers, or to encroach on Sir Charles Ross's property; but he contended, that he had a right to draw his nets on the property of Sir Charles Ross. The Sheriff, in May 1822, pronounced an interlocutor, allowing a proof to the pursuer of the facts stated by him. It was, however, unnecessary to go into proof of the facts, because the respondent distinctly admitted that he had drawn his nets on the Balnagown property, and contended that he had a right to do so, in respect of his moiety of the fishery; and thereupon, on the 4th of October, the Sheriff pronounced an interlocutor, stating that the proof was unnecessary, and therefore recalling the interlocutor directing proof; but 'before further answer, ordains the respondent George Sutherland, specially to condescend by a writing under his hand, mentioning dates, first, on what title he at present possesses, how long, and what subject he has possessed under it, and the term of endurance; and second, whether he possessed both the Rosehall and Balnagown fishings, on the river Cassley jointly, under what titles, and for what period, and whether such possession has ceased, and when it did so.'

My Lords, in obedience to the interlocutor, a minute was given in by the respondent, and the matter coming on afterwards before the Sheriff, he, on the 28th of March 1823, pronounced an interlocutor to the following effect. (Here his Lordship read it.)

Of this judgment the respondent complained to the Supreme Court by bill of suspension, which came before Lord Eldin, as Lord Ordinary on

the Bills, and his Lordship pronounced, on the 20th April 1824, the following interlocutor, finding the respondent entitled to a possessory judgment. (His Lordship then read it.) Your Lordships therefore perceive that Lord Eldin, the Lord Ordinary before whom this case originally came in the Supreme Court, differed from the opinion which had been entertained by the Sheriff, and held that, under the circumstances, the respondent was entitled to his possessory judgment. My Lords, the case then came before the Court; the appellant having given in a reclaiming petition, complaining of this judgment of my Lord Eldin, and the Court, on the 26th June 1824, pronounced an interlocutor, limiting the possessory judgment to the Caseley fishings, and lands and islands, as marked on a plan. My Lords, the islands are marked, and appear to be in that part of the river in which the Balnagown estate extends on both sides of the river. May 19, 1826.

A petition was presented against this interlocutor, by the respondent and appellant, and the Court, on hearing that petition, remitted to the Lord Ordinary, to remit to the Sheriff of Sutherland to find the respondent entitled to a possessory judgment.

My Lords, a third petition was presented against this interlocutor by the appellant, and on this third petition being advised, the Court pronounced as follows:—'The Lords appoint this petition to be seen and 'answered upon the point at issue, as to throwing the nets from the south 'side of the islands.' I will not trouble your Lordships with the terms of the interlocutor, but the Court finally refused the petition by an interlocutor of the 24th June 1825, by which they adhered to the interlocutor reclaimed against; and in regard to the question of expenses, reserved by the said interlocutor to the issue of the cause, they found the petitioner liable to the respondent in payment of the expenses incurred before the Court.

Then, my Lords, there was a petition presented to Lord Medwin, the Lord Ordinary on the Bills, to apply the preceding interlocutors, and remit; and an interlocutor was pronounced by Lord Medwin, on the 16th July 1825, remitting to the Sheriff.

Against those interlocutors this appeal has been brought, and the single question which has been discussed at your Lordships' bar, has been, whether, under the circumstances of this case, there has been that possession by the respondent (and those who have preceded him, in the enjoyment of this Caseley fishery) of the right to draw his nets, and fish, from the banks of the river (those banks belonging to the Balnagown estate), and at those islands in the river belonging also to the Balnagown estate—I say, my Lords, the question has been, whether or not, under the circumstances of this case, there was that possession which entitled the respondent to that possessory judgment which he has obtained in the Court of Session?

My Lords, in the argument on the part of the appellant, it was contended, that, during the time there was this joint possession of the two moieties of the fishery by the same tenant, enjoying under the respective proprietors of those moities, no argument nor any reason can be adduced

May 19, 1826. from thence, in support of the right claimed on the part of the respondent; because, they say, that during that joint possession, it was certainly competent for the tenant, under the grant he had from the Balnagown proprietor, to draw his nets on the banks of the river belonging to the Balnagown property; and that, therefore, it ought not to be inferred from thence that the drawing the nets on those banks was to be limited to the right he derived under my Lord Ashburton, and those who preceded him in possession of the Rosehall estate, because it might be inferred he did it under the right he derived from the Balnagown proprietor. My Lords, in answer to this, it has been said, and I think the Lords of Session have drawn a correct conclusion in that respect, that it appears that these parties were each interested in this fishery; each of them had an half, and that half could not be enjoyed by the Rosehall proprietor, unless he, or his tenants, had a right of drawing their nets on the Balnagown property. They say, it is quite clear, therefore, from these lettings, which took place as far back as memory can go, down to the year 1812, by the proprietors of these properties to the same tenant, reserving an equal rent in respect of each moiety, that it was considered that each proprietor had an equal and co-extensive right in this fishery, which could not be enjoyed unless the Rosehall tenant had a right to draw his nets on the Balnagown property. They refer also to the text-books upon the law of Scotland, and some cases which appear to have established that if a man has a right of fishing in a river, though he has no property in the adjacent banks, the law gives him a right to draw his nets on those adjacent banks. It is answered, however, that the law also is, that if one man has the entire bank on one side of the river, and another man the entire bank on the other, and each has a right of fishing in the stream, each man has a right to the enjoyment of the fishery on his own property, and not to go to the other. But then it is replied, here is the case of a proprietor of a moiety of the fishery in this river, whose lands were not co-extensive with those on the opposite side, for the Balnagown property extended to both sides the river, and the islands at the mouth of the river were the property of the owner of the Balnagown estate. My Lords, the Court of Session appear to have adopted the opinion, that, this being a possessory action before the Sheriff, and looking at the circumstances of this case, the rights of the respective parties being co-extensive, the respondent was entitled to that possession, which had been enjoyed by the tenant before the year 1820, referring that antecedent enjoyment to the respective rights which had been derived by the respective proprietors of the land; and, therefore, the Court of Session have been of opinion in this case, that the respondent ought not to be disturbed in the possession which had been enjoyed by the antecedent tenants, deciding, therefore, in his favour by their judgment.

My Lords, it has been said that there is some ambiguity in the final interlocutor of the Court of Session, and that the result of that judgment may be this: That inasmuch as it gave the tenant of the moiety of the fishery in Cassley, belonging to my Lady Ashburton, a right to fish in the islands as marked on the plan, and on the banks to the north side of

those islands, inasmuch as those islands on the south side did not join to the Cassley, but joined to another river, the Kyle—(the Cassley being said to terminate before it arrives at the southern bank of those islands), the consequence of this interlocutor would be, to give the respondent not merely a right to fish in that river Cassley on those islands, but to throw his nets on the south sides of those islands, into another stream not in dispute in this action. My Lords, I think the answer to that is, that the only right claimed in this action, is the right to fish in the Cassley; and whether he had a right to throw his nets from those islands into the Cassley. The interlocutor merely finds him entitled to a possessory judgment as to the fishings in the Cassley; and as I understand this interlocutor, it gives him no right whatever (supposing the south banks of those islands do not adjoin to the Cassley) to throw his nets into any other stream, but all it gives him is a right to fish from the islands into the Cassley. If, therefore, Mr Sutherland, the respondent, should be so ill advised as to endeavour to found his right to fish on those islands in another river, on what has passed in this place, your Lordships' judgment, affirming this interlocutor, cannot at all be pleaded by him in favour of any specific right to throw his nets from those islands in any other river but the river Cassley. I call your Lordships' attention to this at this time, in order that no impression may be taken from anything which falls from me upon this occasion, or from any judgment I can advise your Lordships to give, that the right of the respondent can be considered, as carried farther than a right to fish in the Cassley. May 19, 1826.

My Lords, looking at all the circumstances of this case, it does appear to me that the judgment of the Court of Session is right. I think the interlocutor itself carries the respondent's right to fish no farther than to fish in the water of the Cassley; and therefore, being of that opinion, I should humbly advise your Lordships to affirm this interlocutor. Upon the question of costs, it is not my intention to propose anything to the House. It is clear that the Court of Session have differed from the Sheriff. The original judgment was certainly in favour of the appellant; and the Court of Session, on this case being brought before them, have, on consideration of that judgment, thought that judgment wrong, and reversed it. Under these circumstances, I do not propose to submit to your Lordships any motion going further than an affirmance of the judgment.

Appellant's Authorities.—Duke of Queensberry, Nov. 19, 1771, and Feb. 21, 1772, (14279.) Dirom, Feb. 25, 1797, (14282.) 2 Ersk. 6. 15, and 4. 1. 50. 2 Stair, 3. 69, and 4. 22. 14. Monymusk, 15th July, and 18th Dec. 1623, (10640, and 14264.) Montgomery, 22d July 1664, (10627.) M'Lellan, 15th Feb. 1669, (10648.) Maxwell, 24th June 1673, (10628.) Maxwell, 26th March 1628, (10617.) Lady Glengarnoch, 18th July 1626, (10632.) Harrer, 25th Jan. 1672, (10628.) Chisholm, 17th June 1801, (app. v. Salmon Fishing, No. 1.)

Respondent's Authorities.—2 Ersk. 1. 4. 28, and 2. 6. 15.

FRASER—RICHARDSON and CONNELL, *Solicitors.*

No. 19. Sir JAMES DUFF, Appellant.—*Fullerton—Tindal.*
The EARL of FIFE, Respondent.—*Keay—Murray.*

Witness—Writ.—Held (affirming the judgment of the Court of Session), that it is a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the granter subscribe nor heard him acknowledge his subscription.

Process—Bill of Exceptions.—Question raised and considered as to what is the proper subject and shape of a bill of exceptions, and what amounts to a direction by the Judge, or only an expression of opinion, or mere obiter dictum?

May 22, 1826.
2D DIVISION.
Lord Pitmilly.

ON the 7th of October 1808, the late James Earl of Fife executed a trust-deed, by which he conveyed his whole fee-simple estates to certain trustees, to be held by them till a certain period, 'and in the event of the said period arriving during the 'lifetime of all or any of the said Sir James Duff, the Honour-'able Alexander Duff of Echt, my immediate younger brother-'german, and of James Duff, eldest lawful son of the said Ho-'nourable Alexander Duff; then, and in that event, this pre-'sent trust shall also further subsist and be effectual, (except in 'the cases after mentioned,) to all intents and purposes, during 'the whole lifetimes of the said Sir James Duff, the Honoura-'ble Alexander Duff, and the said James Duff, and the longest 'liver of them.' On the same day, and in relation to the trust-disposition, the Earl executed a deed of entail of the lands therein mentioned, by which he disponed them to himself and the heirs-male of his body, 'whom failing, to the Honourable 'Alexander Duff of Echt, my eldest brother-german, and the 'heirs-male of his body; whom failing, to Lieutenant-General 'Sir James Duff of Kinstair, and the heirs-male of his body,' &c. Both of these deeds (which were of great length) were subscribed on each page by the Earl, and to each of them there was subjoined this testing clause:—'In witness whereof, I have 'subscribed these presents, written upon this and the 81 prece-'ding pages of stamped paper, by James Gibb, clerk to William 'Inglis, writer to the signet, at Duff House, the 7th day of Oc-'tober 1808 years, before these witnesses, Alexander Forteath 'Williamson and George Wilson, both residing at Duff House, 'the place, date, and witnesses' names and designations, being 'written by the said George Wilson.'

On the 12th of November of the same year, the Earl executed another deed, by which, in certain particulars, he altered the trust-deed; 'but declaring always, that the said trust-'disposition and settlement above recited shall stand, subsist, 'and be effectual, to all intents and purposes, in all its heads,

'tenor, and contents whatsoever, except in so far as regards May 22, 1826.
'the alteration and innovation thereof herein before specified.'
The testing clause of this deed was thus expressed:—'In wit-
'ness whereof, these presents, written on this and the three
'preceding pages of paper, legally stamped (by the said Stewart
'Souter at my desire), are subscribed by me at Duff House, the
'12th day of November 1808 years, before these witnesses, Alex-
'ander F. Williamson and George Wilson, at Duff House.'

The Earl died on 6th January 1809, and was succeeded in his titles and entailed estates by his brother Alexander, who was excluded by the trust-deed from the enjoyment of the trust-estates. Earl Alexander died in 1811, and was succeeded by his eldest son, James (the present Earl of Fife), who also was excluded by the trust-deed from any beneficial interest in the estates therein mentioned. Of that deed, and of the relative deed of entail, and of the deed of 12th November 1808, he, as heir-at-law of the late Earl James, brought an action of reduction, on the ground that they had not been duly tested, and, in particular, that they had not been read to the Earl at the time of signing them, and that one of the instrumentary witnesses neither saw him subscribe them, nor heard him acknowledge his subscription. On these and other points special issues were sent to a Jury, who returned a verdict, finding, inter alia, that the deeds had not been read over to the Earl when he subscribed them, and that it was not proven that he had acknowledged his subscription to George Wilson, one of the instrumentary witnesses. The Lord Ordinary decerned in the reduction, in respect it had not been proved that the deeds were read over to the Earl before signing them, and the Court adhered to this interlocutor, in so far as it decerned in the reduction. Against these interlocutors Sir James Duff of Kinstair, the defender in the action, presented an appeal, and the House of Lords pronounced a special judgment, which concluded by ordering, 'that the Court of Ses-
'sion in Scotland do direct an issue to try whether the instru-
'ments of trust-disposition and deed of entail, both dated the
'7th October 1808, sought to be reduced, being in law pro-
'bative instruments, were not, or either of them was not, the
'deeds or deed of the Earl of Fife; and whether the deed of
'alteration of the 12th day of November 1818, being in law a
'probative instrument, was not the deed of the Earl of Fife;
'and that upon the trial of such issue, the burden of proof that
'such instruments respectively, were not respectively the deeds
'of the Earl of Fife, ought to be upon the respondent seeking

May 22, 1826. ‘ to reduce the same. And it is further ordered, that the re-
‘ spondent be the pursuer in such issue, and the appellant de-
‘ fender; and that upon the trial of such issue, the said several
‘ instruments be produced and be received as probative instru-
‘ ments, to be impeached by the respondent by such evidence as
‘ he may be advised to offer touching the same; and that there-
‘ upon the appellant be at liberty to offer such evidence as he may
‘ be advised to offer in support of such instruments respectively;
‘ and for that purpose, that the appellant be at liberty to offer
‘ the deed of alteration of the 12th day of November 1808 as
‘ evidence in support of the instrument of trust-disposition and
‘ deed of entail of the 7th day of October 1808, so sought to be
‘ reduced if the appellant shall think fit to do so.’

Accordingly, this issue was adjusted, and laid before a Jury, ‘ Whether the instruments of trust-disposition and deed of entail, both dated the 7th day of October 1808, sought to be reduced, being in law probative intruments, were not, or either of them was not, the deeds or deed of the Earl of Fife? And whether the deed of alteration of the 12th November 1808, being in law a probative writ, was not the deed of the Earl of Fife?’.

At the trial, the pursuer (the Earl of Fife) rested his case on two grounds. He averred, in the first place, that George Wilson, whose name appeared as one of the instrumentary witnesses to the deeds of the 7th October 1808, had signed these deeds without having either seen the Earl subscribe, or heard him acknowledge his subscription; and he adduced evidence to prove this fact. He then maintained, in the second place, that in this situation Wilson could not be considered as in law an instrumentary witness; and that the deeds being thus only subscribed by a single witness, whereas two were requisite, were null and void, so that the legal result was, that these two instruments, not being properly executed, could not be held in law to have been the deeds of the Earl of Fife.

The defender (Sir James Duff) led no evidence, but maintained the reverse of these propositions in point of law, and contended, 1st, that although Wilson had signed without having first seen the Earl subscribe, or heard him acknowledge his subscription, this formed no legal objection to the deeds, which therefore were valid and effectual, and to be held in law as the deeds of the Earl; and, 2d, that the evidence adduced by the Earl of Fife was sufficient to show that there had been a virtual acknowledgment, to be implied, by necessary and fair inference, from the acts of the parties at the time.

No evidence was adduced relative to the deed of 12th November 1808, and the Lord Chief Commissioner having addressed the Jury, two separate bills of exception were tendered by the defender as to two parts of his charge to them. On the first question, his Lordship directed the Jury, 'that if they were satisfied 'that the evidence given on the part of the pursuer established 'that the granter of the deed had not acknowledged his subscription to the witness, who did not see him subscribe the said 'deed, to find by their verdict that the said deed was not the deed 'of the Earl of Fife; and did then and there tell the Jury, that 'the law required, in cases in which a witness does not see the 'granter of a deed sign the deed, that he must acknowledge his 'subscription to such witness, otherwise the deed is void in law, 'and therefore is not the deed of the granter.' May 22, 1826.

His Lordship, in the next place, after observing, 'that in this 'case he was of opinion, that there was undoubted evidence (and 'it was admitted) that there had been no acknowledgment by 'words to the witness, who did not see the Earl sign,' he stated to the Jury, 'that in considering any other acknowledgment, 'it was his opinion the acknowledgment must be clear and 'explicit; and that he had not found any case in which a virtual acknowledgment or equipollent had been sustained; but 'that it was not necessary to carry the doctrine so far in this 'case, as, according to the evidence of the two witnesses called 'by the pursuer, (if they, the Jury, believed either of them,) 'it did not appear that there was any acknowledgment either 'express or virtual.' This having been excepted to by the defender's counsel, his Lordship put the above direction in writing, which he read to the Jury; it stated, 'that they were to consider what he read to them as his directions on the part of 'the case which related to the alleged acknowledgment of the 'subscription to the said deeds by the said Earl;' and 'that 'if they believed either of the witnesses, he was of opinion that 'there was no acknowledgment by the said Earl of his said 'subscription to the deeds of the 7th October 1808, to the said 'George Wilson, in which case the said deeds were not the deeds 'of the said Earl, and they would find so by their verdict.'

The Jury then returned a verdict, by which, 'in respect of 'the matters proven before them, they find that the instruments 'of trust-disposition and deed of entail, both dated the 7th October 1808, were not the deeds of the Earl of Fife; and in 'regard to the deed of alteration of the 12th day of November '1808, they find for the defender.'

The exceptions were settled, and made the subject of two

May 22, 1826. separate bills.* Each of these was presented to the Second Division; and in each their Lordships, on the 22d December 1825, pronounced this judgment: 'The Lords having advised this bill 'of exception with the relative proceedings and writings referred to, and heard the counsel for the parties viva voce, disallow 'the bill, and find the respondent entitled to the expenses incurred in the discussion of said bill.'†

Lord Glenlee observed, In relation to the general point stated in the first bill, the simple question here is, whether a deed, in which one of the instrumentary witnesses has neither seen the granter subscribe, nor heard him acknowledge his subscription, per se, bears faith or not? I must confess, that I have always understood it to be a settled question, that where nothing has followed on such a deed, it bears no faith. It is a very different question, when a great deal has been done by the parties on the faith of the deed, whether benefit can be taken of the nullity, or reduction allowed. No nullity, arising from defect of solemnity, can be greater than that from the want of the subscription of the party. Yet disability to bear faith on this ground may be removed by homologation, as in the case of a contract of marriage, unsubscribed by one of the parties, but followed by marriage; or of a tack not probative under the act of 1681; if possession follows, the landlord is not entitled to set it aside: but he is so, even although he admits his subscription, if the tenant has not entered. If a general rule can be laid down as to such cases, it is of this description, that where a party has given forth a deed out of his hand as fair and regular, and binding on him, and has dealt with the world on the footing of its being binding, if he attempt to reduce it on latent nullities, known only to himself, and arising from his own act, as signing without the presence of witnesses, reduction would not lie—and this was, in fact, the case of Smith. But no such grounds for repelling the reasons of reduction apply here, where nothing whatever has been done. The only question is, whether the deeds in this case, vi instrumenti alone, bear faith? and I have no doubt that they do not bear faith, independent altogether of the act 1681. Where there are only two witnesses, and one of them did not see, nor hear acknowledgment, the testing-clause is false, and we must take the case as if the testing-clause had borne that the subscription was before a single

* As these bills are very largely quoted, and commented upon by the Lord Chancellor, reference is made for their contents to his Lordship's observations.

† See 4 Shaw and Dunlop, Nos. 240, 241.

witness; and unless one witness to a deed is sufficient, the exception cannot be sustained. May 22, 1826.

Lord Pitmilly.—I have been intimately acquainted with this case from its commencement, and have been present at most of the proceedings, as Lord Ordinary to the case;—at three trials in the Jury Court, and at part of the proceedings in the Inner-House. It is of importance, with reference to the question now before us, and with reference to that part of the judgment of the House of Lords which has been noticed in the pleadings, to keep in mind the proceedings as to the authentication, by instrumentary witnesses, of the deeds executed by the late Earl of Fife.

The summons contains a conclusion of reduction, on the distinct and separate ground, that the witnesses did not see or hear, &c.

There were seven issues on the first trial—one (the fifth) was directed to this part of the case.

It was thus ascertained, and has never been disputed, 1st, that one of the witnesses did not see the Earl subscribe the deeds; and, 2d, it was found not proven that the Earl acknowledged his subscription to this witness.

This verdict, of not proven, was the subject of much observation in the course of pleadings in the Outer-House, before me, when the case returned to me, in order that the verdict might be applied. The authorities, Stevenson *v.* Stevenson, Campbell *v.* Robertson, Blair *v.* Allan and Peddie, &c. on which the counsel have now argued the case, were all of them, at that time, laid before me. But I held, that, on the supposition of the Earl's signature being the proper mode of authenticating the deeds, the deeds were probative; and therefore, the onus that Wilson did not hear an acknowledgment, lay on the pursuer of the reduction.

Many important remarks appear to have been made on this view of the case in the House of Lords; and all the argument was fully in view when judgment was pronounced. I ought here to mention, that the argument on the question, whether a deed is null where the subscription is not acknowledged, is not to be found in the informations or appeal cases. These are confined to the point of onus probandi, and to the effect of the verdict of not proven.

The judgment of the House of Lords begins, by finding the signature of the Earl his proper signature, and then proceeds,—'And the instruments being apparently attested by two witnesses,' &c. 'Apparently attested,' is a most accurate expression,

May 22, 1826. as the subscription of a person adding the word, 'witness,' to his name, does not constitute him what the law calls and considers a witness, unless he actually saw the granter subscribe, or heard him acknowledge his subscription at the time. The person subscribing as witness, is, in the case supposed, an apparent witness, that is, he appears on the face of the deed to be a witness, but he may not be a witness in law or in reality.

Such having been the grounds on which the case was remitted to try the general issue, whether the deeds were the deeds of the Earl of Fife, I own I was surprised when I learned it was to be maintained, that although it should be proven the Earl of Fife did not acknowledge his subscription to Wilson at the time Wilson subscribed, yet that the deeds were valid.

Several of the authorities which have been referred to on this point, were quoted on the trial, and the Court, which sat full, had no doubt; the industry of counsel has added other authorities since, and I think the opinion of the Court strengthened by these additional authorities.

The defenders are forced to adopt a radical mistake as to our system of authenticating deeds. They hold, that a witness is a person who is to attest the subscription of the granter, and that if he can do so, no matter by what means; and that it is no substantive objection that the witness neither saw the granter subscribe, nor heard him acknowledge his subscription.

Now, a witness does not attest a subscription as a signature which he can attest from his knowledge of the hand-writing. He is never asked or appealed to as to this. What he attests is, that he saw the granter subscribe, or, by the latitude introduced by the act 1681, that he heard the granter acknowledge his subscription. When either of these points is made out, the law holds the subscription to be genuine.

If the defenders' theory were just, the question put to a witness, in the event of challenge of the deed, would not be, 'Did 'you see the granter subscribe, or hear him acknowledge his 'subscription?' But, 'Is that his hand-writing and subscrip-'tion?' In Frank's case, in the case of Steel, and in this case, such would have been the nature of the inquiry, and the import of the questions put. A witness thus interrogated, might answer in one case from having seen the party subscribe—in another, from having heard an acknowledgment—and in a third, from his knowledge of the hand-writing, though he had neither seen the granter subscribe, nor heard him acknowledge his subscription.

According to this theory, it would only be in criminal prose-

cutions under the act 1681, that the question, 'Did the witness May 22, 1822.
'see,' &c. would be relevant. But in a civil question, the question to the witness would be, 'Is this the signature of the 'party?'

Now, we may appeal to the proceedings in all the cases referred to, as proof that this line of interrogation would not have been held relevant, or been permitted.

And, in fact, in the great majority of cases, witnesses called upon to speak to subscriptions which were adhibited at a distance of time, could not attest these subscriptions, from a knowledge of the hand-writing. All a witness can tell is, that he sees his own subscription to the deed as witness, and this fact, as was expected by the legislature, in passing the act 1691, assists his memory to enable him to say that he either saw the party subscribe, or that the party acknowledged his subscription. The preamble of the act 1681 states, that 'By the custom introduced when writing was not so ordinary, witnesses insert in 'writs, although not subscribing, are probative witnesses, and 'by their forgetfulness, may easily disown their being witnesses;' —that is, by their forgetting that they saw the party subscribe, or that he acknowledged to them his subscription, may disown that they were present at the subscription, or heard it acknowledged.

The common method of attesting the subscription of a party is, that the writer of the deed sends two clerks to witness the subscription of the party, who was probably unknown to either of them before, and with whose hand-writing they are unacquainted—they stand by while he subscribes, or if he has already put his name to the deed, he acknowledges his subscription, and they subscribe as witnesses. If such documents, of which there are hundreds attested by every writer's clerk or apprentice, were brought forward, at the distance of thirty or forty years, the witness recognises his own subscription, and from this, recollects that he was present and saw the party subscribe, or that the party acknowledged. In all probability, he has no knowledge or recollection of the hand-writing.

Put the case of a witness not knowing the hand-writing of the party subscribing, and the witness not seeing the subscription, but merely hearing it acknowledged: The witness cannot attest a subscription which was acknowledged to him in such circumstances. He merely attests the acknowledgment, which may be true or false, for anything he knows.

There is a host of authorities in support of this doctrine.

May 22, 1838. 1st, The opinions of three institutional writers, M'Kenzie, Bankton, and Bell.

2d, Express decisions, in which deeds were set aside on this precise ground.

3d, Many cases, in which the relevancy was admitted and proof allowed; and,

4th, Some, in which it is expressly laid down, that the 'non 'memini' of instrumentary witnesses is not sufficient to cut down the attestation by signature.

In the case of Smith of Olrig, there seems to have been a defect of evidence to cut down the testing clause.

I shall not enlarge farther. The case is of importance, and requires research and attention to trace the system,—but when this is done, it is not difficult for a Judge, who attends to decided cases, and respects the system which the wisdom of our ancestors has devised and perfected, to form a decided opinion.

Lord Alloway.—As I concur in general with the opinions that have been delivered, it might be unnecessary for me to say anything. But as, from the importance of the case to the law of Scotland, and especially to that department of it of which we have most cause to be proud, viz. the execution and effect of written deeds, it is perhaps right that every Judge should give his opinion in this case, mentioning the authorities and grounds upon which that opinion is founded.

This case has been long before your Lordships, and you have had occasion to consider it in different views. As it is the first time that I have had occasion to consider it, I was anxious to examine minutely the terms of the remit by the House of Lords, and the very long and full speech of the noble Lord, upon whose motion that judgment was pronounced, which is prefixed to the judgment itself. And I must say, that I have never perused any legal document whatever, exhibiting the same great legal talent, the same research, the same great anxiety, or almost over-anxiety, upon the part of the Judge to attain the true legal views of the case. And it is certainly a matter of the greatest astonishment and wonder to me, that, amongst all his other judicial and his political avocations, he had time to compile a treatise so perfect as that which is contained in the 113 printed pages preceding the judgment. In short, I consider it one of the most singular and able judicial expositions which I have ever perused.

I shall begin, therefore, by calling the attention of the Court to certain parts of that remit, as originating those questions which it is now the duty of the Court to determine.

I find that, in England, it is necessary that the testator execute the will in the presence of the attesting witnesses, and that this is absolutely necessary to give it effect.—See Lord Chancellor's Speech, p. 54. In short, that it must be subscribed in the presence of three witnesses. And again, upon p. 91, the subscription is the thing to be attested. May 22, 1826.

The law of Scotland proceeds upon the same principle. The two witnesses to the deed attest, that they saw the testator subscribe, or heard him acknowledge his subscription; and if they were not present, and did not see the testator subscribe, or hear him acknowledge his subscription, the deed is good for nothing. In the judgment of the House of Lords, where the whole of this learned reasoning is embodied into abstract findings, it is stated as a subject of investigation, whether the witnesses, or one of them, did not see the Earl of Fife subscribe the instrument, or hear him acknowledge his subscription thereto. And with this explanation, the general remit was made, to try whether this was the deed of Lord Fife or not.

The question is, therefore, whether, by the law of Scotland, if one of the instrumentary witnesses did not see the party subscribe, or hear him acknowledge his subscription, the deed so subscribed can be an effectual deed,—and whether the direction given by the Judge in the Jury Court was sound law or not.

I conceive that it was sound law: and I confess that I have imbibed the prejudices which are imputed to our predecessors, and to the different authorities referred to. I conceive, that, by the law of Scotland, it was at all times necessary that the witnesses attesting the subscription should be present, and see the subscription they attest, or that, posterior to the act 1681, they should hear the party acknowledge his subscription.

Now, this can be stated in a very short and simple proposition. By the law of Scotland, it was necessary, long before the act 1681, that every deed should be attested by two witnesses. It seems an absolute solecism to maintain, that although it is necessary that the subscription of every deed should be attested by two witnesses, the subscription of two persons as witnesses, who were not present, could possibly have that effect. It may be a very different question what kind of evidence is to be admitted, in order to ascertain whether the witnesses were present or not, and the effect of that evidence. But if it be admitted, or established, that the witnesses were not present, or that only one of them was present, then I conceive that this deed is not the deed of the granter, subscribed before witnesses, that

May 23, 1826. can receive any faith or effect in judgment, and that it is null and void.

It is a matter, more of curious than of important investigation, to trace the progress of the law, as to the testing of deeds after the discovery of the Roman Code at Amalphi. But, be this as it may, I think it has been demonstrated (what indeed seems to be the opinion of Craig, of Walter Ross, and of Mr Bell) that we derived all our securities, as to subscription of deeds, from the Roman Law; and that our great statute, 1681, is almost a literal transcript from the Roman Novella, 73.

At all times, witnesses seem to have been necessary, whether the deeds were effected by seals or subscriptions. The quotations from all our old authorities, as far back as they reach;—the Reg. Maj., Craig and Balfour, instruct, that witnesses were absolutely necessary. The progress towards maturity in the execution of our deeds, was, by 1540, c. 117, declaring that no faith should be given to evidents sealed, unless the party subscribed thereto and witnesses; or, if the party could not subscribe, by the subscription of a notary.

Then the statute 1579, c. 80, ordains, that all deeds and writings of importance should be subscribed and sealed by the principal party, if he could write, and if he could not, by two notaries, before four famous witnesses.

And then the statute 1593, c. 179, expressly ordains, that the writer insert his name in the body of the writ.

Matters stood upon these statutes for nearly a century, until the whole system was perfected and completed by the statute 1681, which has been stated to be the work of Lord Stair, the greatest lawyer that this country has ever produced.

Now, it is a very important consideration to examine how our lawyers, before the act 1681, considered this subject. From the most early period of our law, of which we have any record, and for centuries preceding the act 1681, deeds, if not subscribed or sealed before witnesses, could receive no faith; and it seemed to be a fatal objection, that the witnesses, or either of them, had not been present at the subscription. If this was the case before the act 1681, the objection was even more powerful after that statute was passed, which only rendered the former law more perfect, although it authorised the attestation of witnesses to a deed to whom the granter had acknowledged his subscription,—whereas, formerly, the witnesses must have seen the party subscribe.

The Reg. Maj. book ii, c. 38, expressly states, that a testa-

ment must be made before two witnesses, who can be fit wit- May 22, 1826.
nesses.

Craig refers to the Reg. Maj., and lays down the same doctrine with regard to all writings of importance.

And Balfour states, p. 368, c. 36, that evidents or writs make no faith, if there be not two witnesses at the least.

Mackenzie lays down the same doctrine, in the most decided terms, in his Observations, not only upon the act 1681, but also upon the preceding statutes; and even mentions the reduction of a deed, by a lady who had not subscribed it in presence of witnesses, and assigns that case as one of the causes for that statute.

And Mr Erskine, in speaking of the solemnities of written obligations by our law, expressly lays it down, B. iii, t. 2, § 7, that it was necessary that two witnesses were truly present; and this observation he makes in considering the act 1540.

In short, it was not seriously disputed that two witnesses were as essentially necessary for supporting a writing or evident, before the act 1681, as posterior to that period, although, previous to that time, from 1540 downwards, there seems to have been a considerable uncertainty in the decisions of the Court, with regard to the mode of receiving evidence, as to the witnesses who were present, by condescendences and otherwise. Yet these very decisions, so old as the period of Durie, and even before that time, recognise, beyond all doubt, the competency of establishing, by parole evidence, whether or not the witnesses were present and saw the party subscribe.

I will not enter into the details of these authorities, but shall refer to Mr Bell's 2d Lecture, p. 83, which appears to me to contain the general result of all these cases.

In the same lecture, he also mentions the cases of the Duke of Douglas, reported by Kilkerran, and Urquhart of Meldrum against the Officers of State, which, although decisions of the last century, related to deeds which had been executed far beyond the existence of the statute 1681.

There are two cases, however, which, on account of their very great importance, must be taken notice of. For, although one of them was decided the year after the passing of the statute 1681, and the other three years after, I conceive that they relate to deeds which had been executed long before the passing of that act.

I allude to the case of Stevenson *v.* Stevenson, November 1682, where the Court found a bond null, in respect one of the witnesses deponed that he did not see the party subscribe. If the shortness of the report in that case be any objection, look

May 22, 1826. at the case of Blair v. Peddie, in 1684, within three years of the passing of the statute.

Mr Bell, p. 240 and 241, takes notice of this as a very severe case. But it seems to have escaped that acute writer, that this must have been a decision upon a bond executed before 1681; as this is a mere action of damages against a person, on account of his having subscribed a bond as a witness, without his having seen the party subscribe, and which had been reduced on that account, and that any acknowledgment prior to the statute 1681 could have no effect in authorising the attestation. So that, whether these decisions in 1682 and 1684 are held to proceed upon deeds executed prior to 1681, or posterior thereto, they seem to be equally important and decisive.

Before considering the decisions and authorities since 1681, it is necessary to take shortly into view the plea of the defender.

He holds, that if the deed be, ex facie, executed in terms of the statute 1681, it is a probative deed, and cannot be challenged, unless upon the head of forgery.

Now, just consider the question under this view. It is an essential requisite in the act that the witness know the party who subscribes, and whose subscription he attests. Your Lordships have repeatedly proceeded upon this ground.

Thus, in the case of Campbell v. Robertson, it was expressly found, that one of the witnesses not knowing the person subscribing, and whose subscription he attested, the bond was null, and this was an express decision upon the statute 1681.

And, in another case, collected by Dalrymple, Walker v. Adamson, (Bell, 279,) the Court proceeded on the same ground, although, from the evidence, the decision was contrary.

Now, if the witness is good for nothing, unless he knew the party, which is quite clear, in what way could any third party, trusting to the bond, know whether the witness knew the party or not? In the same way, how could he know whether the witness was a pupil or not, that being also a fatal objection? Or, in what way could he discover whether any objections applied to the witness?

In short, it is impossible to provide, by any human sagacity, against these risks; and the person in whose favour the deed was granted, had certainly better means of ascertaining that the witnesses were actually present at the execution, than that the deed had been witnessed by a pupil, or by a person not knowing the subscriber.

Now, it is established law, that the slightest error in the de-

signation of a witness may prove fatal to the deed:—A person named Robert instead of John; a person named Thomas instead of Francis; a person named Hillock, his common appellation, although he subscribed Hill—All these, and a variety of other objections, have been found perfectly fatal to a deed, although the subscription was never denied. These cases depended upon this principle, that by the act 1681, two witnesses were indispensably necessary, and that they should be properly designed in the deed. All this, in one sense, is mere matter of form, to secure two witnesses, and that they should be perfectly known, from their designations being inserted in the deed. May 22, 1826.

But can this be compared to the case where there is only one witness present, although another person may have been prevailed on afterwards to subscribe as witness? This would, indeed, be making substance yield to form, if, where two witnesses were absolutely necessary, one should be held as sufficient, the other one not being present. If this were the case, the act 1681 might be thrown into the fire, as then a deed might be effectual, although not subscribed in the presence of either of the attesting witnesses, or without either of them having heard the party acknowledge his subscription. For, supposing that the deed did, ex facie, bear to be subscribed in the presence of two witnesses, and may, in that respect, be held as a probative deed; yet, it is surely competent to instruct, that these witnesses were not present, or that one of them was not present, although, from the deed being ex facie probative, the onus probandi must lie upon the party challenging the deed. It seems utterly impossible to maintain such a ground as this, without maintaining that witnesses to a deed are totally unnecessary. I therefore conceive, if the fact be established, as it is by the present verdict, that one of the two witnesses was not present when the deed was subscribed, and never heard the granter acknowledge his subscription, this circumstance must be absolutely fatal to the deed.

Consider the vast number of cases that have been decided by the Court upon this principle. For, although it is stated that a number of these were in small cases, to which the attention of the Court had not been particularly directed, until the later cases, yet I hardly know such a body of authority upon any one point, whether arising from the opinions of institutional writers, or from decisions of this Court. Really, all our institutional authorities seem to be agreed.—See M'Kenzie's observations upon this very statute.—Mr Erskine holds it as absolutely necessary

May 22, 1828. that two witnesses were truly present at the subscription.—Bankton, B. i. t. 2. sec. 28.—Bell's Lectures.—Ross's Lectures.

There are no less than seven cases, before the case of Balfour and Applin, expressly acknowledging this principle, that the deed was null, if it was proved that one witness only had been present, or had heard the subscription acknowledged.

Then comes the important case of Balfour *v.* Applin and Steel, which is stated at great length by Mr Bell (see p. 246), and who has most fortunately preserved the opinions of the Judges upon it. There a proof was allowed, which was a decision in law, that if the facts had been proved, the deed must have been annulled; and the whole question turned upon the effect of that proof.

It cannot be denied that that case was very fully and ably argued. One of the witnesses, who was expressly called to see the deed subscribed by Mr Steel, admits that he was in the room with the other witness, but says, that he did not see Mr Steel subscribe; and he does not recollect whether Mr Lindsay, the writer, desired him, in Mr Steel's presence, to subscribe as a witness, although he stated, that when he was subscribing as a witness, Mr Steel was looking at him.

Now, as he was in the room, there was great reason to believe, that, from his position, he must have seen Mr Steel subscribe; and, if he was desired by Lindsay to subscribe, as to which Bett's evidence is a mere non memini, and Mr Steel was sitting and looking at him, at the same table, when he subscribed as witness, there cannot be the smallest doubt that this was a witness under the statute, and Bett's deposition was held as a mere non memini. See Lord Henderland's opinion, Bell, p. 250.

This point was again most fully considered in the case of Frank (Bell, 254 and 255); and upon a hearing in presence, the competency of examining the witnesses was decided unanimously; and Lord Eskgrove, who had taken the cause to report, from doubts he had entertained as to the competency of the proof, declares that he was satisfied the decision was right. It was of no consequence how the evidence turned out; and it resolved into a non memini so indistinct, that there was no evidence, nor even any reason to presume, from the testimony of the witness Tod, that he was not in the room at the time that Frank subscribed, as it was proved that the execution of the deed had been delayed until he arrived, and that he was in the same room when the deed was executed, and so situated that he might have seen Mr Frank subscribe.

Your Lordships have the whole opinions given by the Court in that case, as preserved by Mr Bell; and there is not one Judge who doubts the relevancy of the proof, and that the objection is effectual, if it could be made out. May 22, 1826.

Indeed it cannot be seriously maintained, for a moment, that, either according to the statute 1681, or according to the consuetudinary law of Scotland, or any statute that has ever been passed, one witness is sufficient to support a deed, although the other witness is no witness at all, from not having been present.

In short, I consider that this view of the case is supported by every authority; and even those cases where the Court found that the evidence was not sufficient to reduce, are complete authorities to show, that if, by the evidence, it had been instructed that only one witness had been present, or heard the party acknowledge his subscription, it must have been fatal to the deed.

In the great variety of cases referred to by counsel, sometimes the Court, upon advising the evidence, have annulled the deed, and sometimes have supported it. But all these were mere decisions upon the evidence; and one and all of these cases, of which such numbers have occurred since the act 1681 passed, are express judgments upon the point of law, that the deed must be null, if the subscribing witnesses were not present, or did not hear the party acknowledge his subscription.

I therefore completely concur with the opinions given by your Lordships.

Lord Justice-Clerk.—The bills of exception that were tendered to the charge of the presiding Judge, at the Trial of the Issue directed by this Court, in obedience to the judgment of the House of Lords, have been argued on both sides with great ability, learning, and research, and we are now called upon to determine, Whether both or either of these bills have raised any legal objection to the law laid down to the Jury, and ought to be allowed?

Taking the first bill in order, the question to be determined is, whether the direction in law contained in it, is well founded?

Although our attention must be mainly directed to the provision of the act 1681, as peculiarly applying to the objection which was taken to the validity of the deed of the Earl of Fife (and which, according to the express words of the judgment of the House of Lords, as well as from the clear principles of law applicable to the point, it was undoubtedly incumbent on the pursuer to prove had not been complied with), yet it is certainly

May 22, 1826. proper to keep in view, what were the previous state of the law and the statutory regulations, for the authentication of Scottish deeds.

That those rules have been introduced and borrowed from the Roman law, and especially in requiring witnesses, in the authentication of deeds, 'quia præsentibus eis confectum est documen-'tum,' in the language of Justinian, I am disposed to concur in opinion with the views of the pursuer's counsel, (and it certainly is a proposition firmly fixed in that law,) that the witnesses there required, should be persons present, and who know and can attest the truth of what they witness. In regard to a testament, this is expressly laid down in the Regiam Majestatem: 'Debet au-'tem testamentum fieri coram duobus vel pluribus viris clericis 'vel laicis, vel talibus, qui testes inde idonei esse possunt."

This of itself is sufficient to put an end to the theory, that presence and personal knowledge of the maker of a deed, is no essential characteristic of the witness who attests it.

The earliest statute, 1540, c. 117, in contemplation of the evil that men's seals may be feigned, provided that no faith be given to any deed, 'without the subscription of him that awe the 'samen, and witnesse,' or else the subscription of a notary, if the party could not write.

Here subscription seems required, even of the witness, who must be presumed as present at the execution, though, in practice, it unaccountably was not at first required.

The act 1579, c. 80, required the writs to be subscribed and sealed by the principal parties, if they can write, otherwise by two notaries, before four famous witnesses, denominated, by their dwelling-places, or other evident token, that the witnesses may be known, 'being present at that time, otherwise the said writs 'to make no faith.'

Now, though there is an ambiguity regarding the latter provisos extending to the case of a party subscribing, it is certainly most important, that Mackenzie, Bankton, and Erskine, hold it as clearly implied; and, though there may have been varying decisions on the point, it seems impossible to question, that the presence of witnesses, at the execution of the deeds, was held indispensable.

The act 1593, c. 179, required the writer's name and designation 'before the inserting the witnesses therein,' under the pain of making no faith in judgment.

Now, surely, there was here an understanding in the legislature, that witnesses should be insert, in regard to all sorts of deeds.

But, to remove all ambiguity, and to provide for the evil of witnesses insert not subscribing, and to do away with any practice that had arisen of their not being designed, and also of allowing them to be condescended on, the act 1681 was passed. May 22, 1826.

But this act went farther to declare who alone should thereafter be deemed probative witnesses, and to define who, in fact, those described as witnesses insert and subscribing, truly were, in the eye of law; and in order to render this most important enactment complete, while it granted the indulgence of allowing the party to acknowledge his subscription to the witnesses at the time of their subscribing, it annexed, as a penalty, to any one assuming that character, contrary to the will of the legislature, that he should be punishable as accessory to forgery.

I can by no means accede to the argument, that this penalty only attaches where the deed is in fact a false instrument. I think, on the contrary, that a new species of the crimen falsi was here established; and that the guilt is incurred by doing what is here in reality prohibited.

It is, however, maintained, that no nullity is annexed to the violation of this part of the statutory enactment; and that it would be dangerous to create it. As to the danger from the objection being latent, it is no greater than many others that would be fatal to witnesses.

It may as fairly be contended, that the sanction of nullity of a deed, is not annexed to the provision in the first member of the enactment of the statute, in declaring, 'that only subscribing wit-'nesses, in writs to be subscribed by the party hereafter, shall 'be probative, and not the witnesses insert not subscribing,' in not repeating the sanction of the previous act.

But I cannot help considering, that this is putting an unwarrantable criticism upon it. The whole of its enactments must be taken together; and it appears perfectly fair to consider what is the true meaning of what the act declares to be the characteristics of the probative witnesses it has described.

Now there is an explicit declaration in both parts of the act; and the deviation from either, must be attended with the same effect.

The latter part must, in fact, be held to ride over the whole enactments of the statute; and if it had preceded the rest, although it was not followed by declaring the deed null, there seems no reasonable ground to doubt that such must still be its effect.

A person who is not in the predicament pointed out by the framer of the act, is declared not to be one of the witnesses that

May 23, 1826. it speaks of; and unless it is to be held that it is unnecessary to have a deed authenticated by witnesses at all, there arises on the face of the act 1681, combined, it may be, with the former state of the law, a manifest declaration of nullity or invalidity of the deed so imperfectly executed.

As to the theory, that notwithstanding the positive terms of the enactment, nothing is to follow, unless the deed is actually proved to be a false and forged instrument, and that the witnesses required to it were for the purpose merely of detecting such forgery—I cannot accede to it, and I have seen no authority for such a construction of the statute.

I have seen as little authority for holding, that the statute meant to leave to witnesses to satisfy themselves as to the genuineness of the deed, and the subscription of its granter, from any sources they may think proper.

I think the act, on the contrary, defines, in the most explicit terms, the only legitimate authority on which witnesses are warranted to sign or attest a deed. When witnesses subscribe, without either seeing or having the subscription acknowledged—they leave the deed without witnesses at all—as none but such as the act defines are the witnesses recognised by law.

Independently, therefore, of authorities, such appears to me to be the fair result of a due consideration of the act 1681, when taken in conjunction with the previous statutory regulations.

But on such a point as this, it is certainly of the greatest importance to attend to the opinions of institutional writers, and the decisions of the Court, in cases where the invalidity of deeds has been expressly maintained on this ground; and certainly I never saw a point, regarding which the stream of authorities and decisions ran more manifestly in one uniform course.

I consider it quite unnecessary to go through these authorities minutely, especially as it was finally admitted that they lie all on one side.

But the authority of M'Kenzie, when commenting on this very statute, which had been passed in his own time, is certainly one of great weight, as it is impossible to doubt that he holds it as a fixed point, that a witness, signing without having complied with the requisites of the statute, will be liable in damages, if a reduction proceeds ex eo capite. Here there is no possibility of surmising that a doubt existed in his mind, that a non-compliance with the act inferred a nullity.

The opinion of Bankton, which is not contradicted by Stair or Erskine, is also a strong and explicit authority to the same effect.

And, lastly, we have Mr Robert Bell's opinion as to the nullity, though he thinks it is not created by the act 1681, as to which he seems wrong. May 22, 1826.

But to these are to be added the opinions of those great and eminent Judges, who delivered their views of the law in the various cases in which proofs have been allowed, that the instrumentary witnesses did not see the granter subscribe, or hear him acknowledge his subscription. For, as to the feeble attempt to do away with the effect of such cases, in which the objections so taken were repelled for want of the due measure of evidence, from the proofs having been allowed before answer as to the relevancy, it cannot possibly avail, as such a course of procedure never could have been adopted, had a doubt been entertained of the relevancy or effect of the challenge, if established.

We have, then, in those cases, the authority of Lord Justice-Clerk Braxfield,—even Eskgrove (though at first jealous of allowing the instrumentary witnesses to be examined), Henderland, as well as those eminent Judges who decided the cases of Young, &c. in 1761 and 1770, and Lord President Campbell, whose words, in giving his opinion in the case of Frank (according to Mr Bell's report), are most important and decisive.

He says, 'The two questions in this case arise upon the act '1681; and the first is, whether you have evidence that the in-'strumentary witnesses did see the granter subscribe, or hear 'him acknowledge his subscription? for, if you have not suffi-'cient proof of that, you must set aside the deed.'

As to decisions, beginning with that of Stevenson in 1682, one year only after passing the act, down to the case of Condie, they are all directly of the same import, and show clearly, that where the evidence was complete, the deed was annulled;—and in fact that no question was ever raised as to what the effect would be, of the deviation from the statute being established.

The case of Blair and Allan *v.* Peddie, in 1684, is a most important one. 1st, It shows, that improbation was the course adopted, as to the form of action in such cases. This is expressly stated in Falconer's report of the case. 2d, He also states, that on Blair's having deponed, 'that albeit he was a subscribing 'witness in the bond, yet he did not see the granter subscribe 'the same; upon whose deposition, the bond being declared 'null, and to make no faith,' action of damages was raised and sustained against the witness, and decree given. No more express decision on the point can be conceived than this is.

It would be a useless waste of time to travel through the other cases, all of which I have examined with attention, and I find they are exactly as referred to.

May 22, 1826. I may just notice, as a decisive answer to the idea, that a separate challenge on the head of falsehood is requisite, that Elchies observes, in the case of Philips *v.* Crichton, that 'till the deed 'be improven, there can be no punishment of the witnesses,'—clearly applying the remark to the species facti then under consideration, of a party having procured witnesses to sign, before the party had subscribed the deed. And there the Court expressly found it relevant to reduce the bond, that the instrumentary witnesses did not see or hear the granter acknowledge his subscription.

The case of Macphail is also a decisive authority to show, that even the admission of the signature of the party does not at all remove the objection arising from the statute.

This is farther illustrated by the case of Young *v.* Ritchie, in 1761, where a bond was found not probative, because the witnesses subscribed before, and not after the party.

The case of Young *v.* Glen, 2d August 1770, as noticed by the counsel for the pursuer for the first time, is also most important.

As to all those cases in which proofs have been allowed, and evidence found insufficient, I need say nothing. They all proceed on taking it as fixed, that if the fact was proved, the nullity of the deed must follow.

I concurred in the judgments in the cases of Condie and Smith of Olrig, and have never entertained any other view of the law applicable to such cases, than what I am now expressing.

Both of these cases were of a very special nature, and I need not now dwell on their circumstances. It was, however, on the deficiency of the evidence that the judgments in both mainly proceeded; though, in the case of Smith, some views were no doubt thrown out, tending to support the pleas which the defenders have urged in this case.

But in the case of Condie, no such doubts were stated, and one of the strongest opinions for reducing the deeds there, was that of my Lord Craigie, who stated, that his opinion in the case of Smith of Olrig had been misunderstood: As to the indication of opinion contained in the judgment of this case in the House of Lords, I think it would be unbecoming to say much. It certainly must, however, be admitted, that that judgment contemplated the challenge of Lord Fife's deed, on the very ground we are now considering.

As to what evidence shall be sufficient to support an objection of this nature, I must continue always to think it ought to be clear and decisive; and that every presumption in law requires that such evidence should be most thoroughly and rigidly sifted.

That is, however, the province of the Jury, under the direc- May 22, 1826.
tion of the Judge who has to try such an issue. But, holding the fact to be clearly established, that the instrumentary witness to a deed neither saw the granter subscribe, 'nor did the party, 'at the time of the witness's subscribing, acknowledge his sub-'scription,'—that deed is, in my opinion, null in law, and any other conclusion would render the act 1681 altogether nugatory. The direction, therefore, given by the Lord Chief Commissioner to the Jury, as excepted to in this first bill, was correct, and the bill of exceptions ought to be disallowed.

In reference to the second Bill of Exceptions,

Lord Glenlee observed,—If the objection had been, as stated in the exception that was taken before the Jury retired, and without the subsequent statement that was then put in writing by the Judge, and read by him to the Jury, as his charge on the subject, we would have to consider a case different from the one before us. What the Chief Commissioner said, just amounted to this,—I have certain opinions on the matter—a certain opinion as to the acknowledgment required by law; but it is unnecessary to give any direction in point of law here, and I state my opinion on the facts in evidence, as to which it is your province to judge. Because, whatever is acknowledgment to any one, it is no more than that the granter of a deed wishes him to subscribe witness to his subscription. And the amount of the whole is, that the Lord Chief Commissioner withdrew the opinion which is complained of, giving no direction at all, in point of law, as to acknowledgment.

Lord Pitmilly.—Before saying anything on the merits of the question raised, it is proper that I should explain the principles on which the bill was framed, and particularly why the narrative of part of the evidence was introduced.

When exception is taken to the direction of a Judge in law, on part of the case, it is necessary for the information of the Court, who are to judge of the exception, 1st, To state as much of the evidence as must be known to show the circumstances in which the direction was given. 2d, To abstain from giving the rest of the evidence which might lead to an opinion on the whole cause, and not on the particular point.

Recent as the institution of Jury trial is in this country, there is authority for this. In the case of Clark against Callender, an objection was taken to parole proof offered, as incompetent. The objection was sustained. And there was a verdict for the defender, as the pursuer led no proof. A bill of exceptions was taken. The bill does not give any account of the

May 22, 1828. proof offered, whether as to the bargain, or rei interventus, or what. The exceptions were over-ruled here, and when the case went to the House of Lords, it is understood that the style of the bill was complained of. It was said, that it should have specified the precise nature of the evidence offered and rejected.

This led to more particular inquiry as to the proper form of bills of exceptions in such cases. There are probably many English cases, but I cannot be expected to be informed as to many. I derived my knowledge on this subject, from the case of Fabrigas against Moyston, 1773. State Trials, Vol. XX. p. 190.

This was an action of damages for false imprisonment, and banishment out of Minorca, by a native, against the Governor. The pursuer had been imprisoned, and banished for exciting disturbance, and improper conduct. The defence was, that the proof of Moyston being governor, with certain powers, ought to have excluded such a claim in a British Court. Justice Gould, however, over-ruled the defence, and L.3000 damages were given.

A bill of exceptions was taken, and in it (1.) all the evidence of the defender being governor, on which he relied, was narrated; but (2.) no part of the other evidence in the case. I must remark, that the 'plea' of the Governor is stated in the bill and 'replication,' so that the point was distinctly explained without the evidence. Still, however, the evidence on which the Judge relied, was given, and not quoted, but narrated.

It was much more necessary, in this case, to have some of the circumstances stated in which the doctrine as to virtual acknowledgment was laid down. (1.) That if anything took place, it was in the Charter-room where Wilson subscribed. (2.) That one of the witnesses says, Lord Fife was not there—the other, that he came in, but was in a particular situation;—and, (3.) That Lord Fife was nearly blind.

As to the merits of the exception, I need say little. I shall not enter on the criticism of the words 'equipollents' and 'virtual,' stated by counsel. I agree with those acting for Lord Fife.

But the broad and strong ground of the answer is, that it is an attempt to lay hold of a part of the charge—an obiter dictum, which the Judge thought unimportant, and plainly excluded from his direction. It would be difficult, indeed, to charge a Jury, were such an attempt to be successful.

The exception, as taken at first, was confined to a few words, without taking what preceded and what followed—thus, 'that 'an acknowledgment, when a witness had not seen a party sign 'a deed, must be clear and explicit, and that he had not found

'any case in which a virtual acknowledgment, or an equipol- May 22, 1826.
'lent, had been sustained.' But the observations made were very different. See quotation on the same page of the bill, a little farther down.

The defender's Counsel admitted that the doctrine of the Lord Chief Commissioner applies to an acknowledgment otherwise than by words. If this had not been seen at first, I should think the bill of exceptions would not have been taken.

But, at all events, there was no direction to the Jury as to virtual acknowledgment. The observation made was, that it was not necessary to lay down a direction on the subject, and the obiter dictum flies off.

Lord Alloway.—I entirely concur in the opinion expressed by your Lordships, upon the second bill of exceptions; and Lord Pitmilly has expressed so fully my sentiments upon every point, that it would be unjustifiable in me to detain you.

Perhaps the term 'equipollents' used by the Judge in addressing the Jury, was not the term best adapted to the circumstances of the case; but a Judge, in delivering an extemporaneous opinion, may surely be excused for using a term, although another more accurate might have occurred to him in his study. But independent of this altogether, it was certainly in the power of the Judge to correct his statement, lest it might, in any respect, have been mistaken, or have misled the Jury; and, accordingly, his Lordship completely corrected this in the after part of his charge to the Jury, by stating that the acknowledgment must be clear and explicit, but that even that doctrine did not apply to the present case, 'as, according to the evidence of 'the two witnesses called by the pursuer, it did not appear that 'there was any acknowledgment, either expressed or virtual.'

I am satisfied, therefore, from the circumstances stated in the bill of exceptions itself, that the direction was sound, and that there are no grounds for the bill of exceptions.

Lord Justice-Clerk.—As to the second bill of exceptions, tendered on another part of the charge to the Jury—in the view that it occurs to me, it will not be necessary to say much.

Though pretending to no peculiar knowledge as to the proper form of bills of exceptions, I am very clearly of opinion, that they can only be taken to directions in point of law, which are given for the consideration and guidance of a jury; that matter of observation, upon the general or particular bearings of the evidence, cannot be excepted to on the ground of misdirection; and that a particular member of a sentence cannot be excepted to, without the context, and what is absolutely necessary for its

May 22, 1826. due understanding being taken along with it. In short, that a charge is not to be judaically interpreted.

Now, keeping these observations in view, and giving to the passage in the learned Judge's charge its fair and obvious meaning, there seems no ground for maintaining, that any direction, in point of law, was actually given to the Jury for their guidance in the formation of their verdict, in the passage of the charge that is in reality the foundation of the bill of exceptions.

For I cannot hesitate in holding, that it is to the words which were put in writing, and read to the Jury, we are bound to attend; and that it never can be held as a valid ground of exception, the catching an accidental expression that may drop in the hurry of speaking.

Now, see what were the words used? Whether the preceding observations are, or are not, to be held as a correct exposition of the law, or whether some degree of greater precision or explanation of the sense in which the terms are used, might not have been requisite, in order to prevent all ambiguity, had it really been intended to direct the Jury on this point, it is, in fact, unnecessary to inquire. Because it is quite clear, that the concluding expressions sufficiently explained, that the case was considered as one to which any such doctrine was inapplicable; and that it was unnecessary to carry it so far in this case, 'as, 'according to the evidence of the two witnesses called by the 'pursuer—if they, the Jury, believed either of them, it did not 'appear there was any acknowledgment, either express or vir-'tual.'

This being the state of the fact, it does not appear to me, that it can fairly be maintained, that the law, as to any equipollent for the acknowledgment required by law, or as to the effect of a virtual acknowledgment, was given as a direction to this Jury; or, that there is any ground for holding, that it may have influenced their verdict.

I think it, therefore, unnecessary to say more, than that this second bill of exceptions ought also to be disallowed.

Against these judgments separate appeals, applicable respectively to the two bills of exceptions, were entered to the House of Lords.

Appellant.—1*st Point.*—The special ground of nullity, that the Earl did not acknowledge his subscription to the instrumentary witness George Wilson, who had not seen him sign, upon which it has been found that the deeds of the 7th of October 1808 are not the deeds of the late Earl of Fife, does not rest

either on the practice of the law of Scotland, or on any of the statutes prior to the act 1681. There is a marked and important distinction between the absolute nullity of a deed and its mere insufficiency, unless supported by extraneous evidence to attest the consent of the granter to its contents. This is to be found in our statutes, and in our decisions. Prior to 1681, the deeds in question would not have fallen, in consequence of the nullity now found fatal. But neither does the statute 1681, giving it a fair construction, sustain the specific ground of nullity at issue—and the cases which appear inconsistent with this view are either inconclusive, or do not bear a reference to the true meaning of the statute. The direction in law, therefore, of the Judge, which necessarily implied, that when the witness had not seen the party subscribe, it was necessary that he should hear the acknowledgment of the signature to the witness, was clearly erroneous. No rule could be more dangerous, or more hostile to the act 1681. It is unwarranted in law, and destructive in practice, of the security of every right founded upon written evidence, to say that the deeds must be null, because it is proved that one of the instrumentary witnesses did not receive his information as a witness in one particular form, that of express acknowledgment. If the signature of two witnesses appear on the instrument, and these witnesses knew that the granter had actually signed the deed, that is sufficient. May 22, 1826.

Respondent.—The necessity of the actual presence of instrumentary witnesses at the moment when the granter signed, or of hearing the acknowledgment of the signature, is a fixed point in our law. The witness attests by his subscription, not merely the fact that he knows the signature of the granter to be genuine, but that he saw that genuine signature voluntarily adhibited—or afterwards, that it was voluntarily acknowledged to be genuine. There is no instance of a deed being supported by the instrumentary witnesses signing it, and then coming forward and stating, that although they did not see the granter sign it, or hear him acknowledge his signature, they are ready to declare judicially that they know the deed to be authentic. The danger that may arise from the force given to instrumentary witnesses, affords no reason for denying effect to a rule of law, implied in, and sanctioned by all the Scotch statutes upon the subject, the practice of two centuries, and the commentaries of the institutional writers. Indeed, the real danger is of an opposite description. The direction, therefore, by the presiding Judge of the Jury Court, with the concurrence of the other Judges, was warranted in law.

May 22, 1826. *Appellant.—2d Point.*—The direction of the Judge, both in form and substance, imported an instruction to the Jury upon a point of law involved in the general issue submitted to them, and was calculated to affect materially their conclusion on the evidence. His Lordship's obvious meaning was, that if an explicit acknowledgment—an acknowledgment expressed either by words or positive signs—was disproved, the deeds must be held not to have been the deeds of the Earl of Fife. But this is in the face of the statute 1681, and of the construction it has received in practice. A virtual acknowledgment is in law quite sufficient to validate the attestation of a witness.

Respondent.—No such direction was given as alleged by the appellant. The Lord Chief Commissioner rested his charge on grounds quite different from a rejection of virtual acknowledgment or equipollent. His Lordship held it unnecessary to inquire into the legal effect of virtual acknowledgments or equipollents, because the evidence showed there had been no sort of acknowledgment whatever. But even had a direction on the subject of virtual acknowledgment been given, the direction would have been sound in point of law. For although acknowledgment by signs may be sufficient, because that, like words, conveys the mind of the granter to the witness, yet equipollents —acts which do not amount to acknowledgment at all, but of equal force—will not support a deed, and that was the import and substance of that part of the charge, represented as a direction to the Jury.*

The House of Lords pronounced this judgment in both cases, that in respect they 'do not think it necessary to pronounce any 'judgment upon the objections which have been stated in the 'course of the hearing of this matter, to the bill of exceptions 'annexed to this appeal, by reason of there being another bill of 'exceptions tendered on behalf of the same party, annexed to 'another appeal, or by reason of objections taken in matter of 'form, this House being of opinion, that the Lord Chief Com-'missioner's directions to the Jury, as stated in the bill of ex-

* In the course of the debate at the Bar, an objection was raised by the House, that the exceptions ought not, in point of form, to have assumed the shape of two separate bills of exception, but that there should have been one bill and one record; and that, besides, they were not explicit, as it did not appear to what deed or deeds reference was made—the term deeds being employed generally, while there were three deeds in question. The discussion of the case was therefore interrupted, with the view that this error might be remedied, by still presenting the substance of the exception in one bill. A new bill was accordingly drawn up by the parties, to obviate these objections, but it was not founded on, as the Lord Chancellor afterwards thought it preferable to proceed with the record in the shape in which it had been brought up.

'ceptions, annexed to this appeal, could not be justly excepted May 22, 1826
'to; and therefore, it is ordered and adjudged, That the said
'petition and appeal be, and is hereby dismissed this House;
'and that the said interlocutor therein complained of, be, and
'the same is hereby affirmed: And it is further ordered, That
'the appellant do pay, or cause to be paid, to the said respond-
'ent, the sum of £50 for his costs, in respect of the said appeal.'

LORD CHANCELLOR.—My Lords, with reference to the value of the property in question, to the points which have been under discussion before your Lordships, this is certainly a very important case: at the same time, I must say, that unless I mistake entirely the whole doctrine of bills of exception, the difficulty rests more upon the manner in which this case has been brought before this House, than on any question which presents itself to my mind, about the law of the case.

The cause began by a suit, which was instituted for the purpose in effect of annulling two deeds of the 7th October 1808. There was another deed executed in the month of November 1808, which, upon the face of it, appears to have made an alteration of one of the deeds of October 1808. In the course of the litigation which took place in the Court of Session in Scotland, the Court thought proper to direct seven issues. The first issue was, 'Whether, at the date of the deed under reduction, viz. on the '7th October 1808, James, Earl of Fife, deceased, was totally blind, or 'was so blind as to be scarcely able to distingnish between light and 'darkness; and whether the said Earl was at that time incapable of read-'ing any writing, written instrument, or printed book; and if at that 'time he could discover whether a paper was written upon or not?' The second issue was, 'Whether the said deeds were read over to the said 'Earl previous to his name being put thereto; and if so, in presence of 'whom? and if read over to the said Earl, as aforesaid, whether they 'were all, or any of them, read to him at one and the same time, or at 'different times; and if at different times, whether they were deposited 'and kept in the room in which they were read, during the whole period 'which elapsed from the commencement of the reading till the name of 'the said Earl was put to them, as aforesaid, or where they were depo-'sited? Thirdly, Whether the said Earl's name was put to the said deeds, 'or any of them, by having his hand directed to the places of signing, or 'led in making the subscription, or if the said Earl was assisted; and if 'so, in what manner he was assisted in making his subscription? Fourth-'ly, Whether the said Earl put, or attempted to put, his name to the said 'deeds, or any of them, at one and the same time; or whether any pe-'ried of time intervened; and if there were any interval or intervals of 'time between the said acts, whether the said deeds, and all of them, were 'in the possession and custody of the said Earl, or were in the possession 'or custody of any other persons, during such intervals of time? Fifth-'ly,' (and I beg your Lordships' attention to the fifth issue, because it appears to me, that the Court of Session, when they directed these issues,

May 22, 1826. must have had in view, that it was of importance that they should have an answer to so much of the question contained in the fifth issue, as relates to the acknowledgment of the subscription to the witnesses,) 'Whether the said Earl put his name to the said deeds under reduction, in 'presence of the two instrumentary witnesses, or either of them; or did 'acknowledge his subscription to them, or either of them; or at what 'period he made such acknowledgment? Sixthly, Whether the said Earl 'was, until the dates of the deeds under reduction, or at a later period, 'a man remarkably attentive to, and in the use of transacting every sort 'of business connected with his estate; and in the practice and habit of 'executing, and in fact did execute, deeds of all sorts connected with 'his own affairs, by subscribing the same with his own hands, and without the intervention of notaries? Seventhly, Whether the said Earl took 'means to ascertain that the deeds under reduction, alleged to have been 'signed by him, were conform to the scrolls of deeds prepared by his 'agents, under his special direction; and what were the means he took to 'ascertain the same?'

These issues were tried: And as to the first issue, the Jury found, 'that 'James, Earl of Fife, at the date of the deeds, under reduction, viz. on 'the 7th October 1808, was not totally blind, though he could scarcely 'distinguish between light and darkness; the said Earl was at that time 'incapable of reading any writing, written instrument, or printed book; 'he could not at that time discover whether a paper was written upon or 'not.' As to the second issue, 'that the said deeds were read over previous 'to the said Earl's name being put thereto, in presence of Stewart Souter and Alexander Forteath Williamson, or one or other of them, it is 'not proven, whether they were all read to him at one and the same time, 'or at different times, but one was read at the time that the deeds were 'signed.' Your Lordships are aware what is meant by the expression in a Scotch proceeding, 'that it is not proven.' Our law holds, that that which is not proven does not exist; but there is an understanding in the Courts of Scotland, as I take it, that, by using these words, they do not mean to negative positively the existence of that which they say is not proven; but that the thing may exist, though it be not proven to them. The verdict proceeds—'There is no proof whether they (the said deeds) 'were deposited and kept in the room in which they were read, during 'the whole period which elapsed from the commencement of the reading 'till the name of the said Earl was put to them, as aforesaid, or where 'they were deposited. As to the third issue, that the Earl put his name 'to the deeds, by feeling for the finger or fingers of another person, on the 'spot, for signature, and was no otherwise assisted than as above described. As to the fourth issue, that the Earl put his name to the deeds 'at one and the same time. As to the fifth issue, that the Earl put his 'name to the deeds under reduction in presence of one instrumentary 'witness, viz. Alexander Forteath Williamson; but it is not proven that 'the Earl did acknowledge his subscription to George Wilson, the other 'instrumentary witness. As to the sixth issue, proven in the affirmative.

'As to the seventh issue, that the only means which the Earl took to 'ascertain that the deeds under reduction were conform to the scrolls of 'deeds prepared by his agents, under his special directions, were his 'having heard the said deeds read over to him.' May 22, 1826.

My Lords, there was a bill of exceptions taken to the proceedings upon that trial, which was disallowed by the Court of Session. The case then came to be discussed before the Lord Ordinary, on the effect of the verdict. The pursuer, as the Case represents, maintained three distinct propositions as grounds for reducing the deeds: 1st, That they were not, as the law requires, where the granter is blind, attested by two notaries and four witnesses, with the usual formalities that are observed when deeds are executed in that form; 2d, That the deeds were not, as the law requires when the granter of a deed is blind, read over to Lord Fife before signing, and that there was no evidence that he was informed of the contents of those deeds; 3dly, That the deeds were not executed in terms of the act 1681, in regard that one of the two pretended instrumentary witnesses did not, as the act requires, either see the granter subscribe, or hear him acknowledge his subscription.

My Lords, the Cases upon your table then state what was the interlocutor pronounced by the Lord Ordinary upon this occasion, and the course of the proceedings in the Court of Session. Your Lordships will not be surprised, I think, that in a case of this importance there was an appeal to this House; and it appears that counsel were heard upon it nine days, I think, in this House:—A circumstance, perhaps at this time a little worthy of notice, because, when persons are complaining that causes are not decided, they are apt to forget that some of them may be of a tolerable length; and I may refer to this, as an occasion on which, I think, I may venture to say, that those Lords whom you are pleased to distinguish (though they may not always preserve the distinction) as being both noble and learned Lords, never did take more pains to offer to your Lordships their humble advice, as advice you ought to act upon, than they did in that case. I may take the same liberty of stating, indeed I am afraid I must call it repetition, that I lament, for my own sake, to have seen in print, upon the table of this House, in the course of the present session, (I allude to the case of Gordon against Robertson,) a statement made to the Court of Session in Scotland, that I advised this House to proceed according to the law of England in a Scotch case. I see many gentlemen, of whose knowledge, and learning, and conduct in their profession, I cannot speak so highly in their presence as I really esteem them, but I am anxious, in their presence, to state what I mentioned the other day in the presence of English counsel, that I am extremely glad to observe, that even in that same judgment, as delivered by me at the conclusion of it, there is that which is quite irreconcilable with any such idea; and that, in another report of the case, it does not appear that any such expression ever fell from me; and in this period of my professional life, I can declare, and that with as much sincerity as I ever stated anything in relation to any transaction of my life, that from the first to the

May 23. 1826. last of that which I have had judicially to deal with, Scotch cases, it has been matter of the utmost anxiety to me to recollect that I am an English lawyer; that it is my duty to guard myself against the prejudices or notions which, as such, I might entertain; and that I am called upon judicially to declare my opinion as a Scotch lawyer, if I may so express it, sitting in the Court of Session by appeal. It may have been my misfortune, and if it has been my misfortune I greatly regret it, that against those prejudices and partialities, or whatever you may be pleased to call them, which an English lawyer, travelling through more than half a century, may have imbibed, he may not have sufficiently guarded himself. But that, in the exercise of that duty, I have felt that anxiety, and have been influenced by it, I must take upon myself, for the sake of my own judicial character, most solemnly to declare.

My Lords, I will take the liberty of noticing again, that to which I adverted the other day*—the expression which is to be found in the judgment of one of the Lords of Session, with whom I have fought many hard battles as counsel at that Bar, I mean my Lord Hermand; wishing, as one man far advanced in years, to be most kindly remembered by a man whom I have known in the profession. I observe he states, at the end of his speech, 'suppose that the landlord had inserted in his articles and 'conditions he refers to, that the tenant should hang himself the last year 'of the lease, I should be glad to know what the Lord Chancellor, or 'any person, would say to that?' Now, to that question I should be very ready to give my learned friend an answer; but as it does not appear to me to have been very regular to put that case in a court of justice, I shall take the liberty of not giving an answer to it, till I meet my old friend out of a court of justice.

My Lords, I certainly gave great consideration to this case when it was before your Lordships, and I availed myself of an opportunity of looking into the papers in the case before the judgment was pronounced; and undoubtedly we miscarried most grossly, I think, in our judgment, if it can now be contended, that a deed is not to be acknowledged, at least in some way or other acknowledged, to a witness who did not see the granter subscribe it. Our notion was, that instead of sending these various issues, the facts might be contained in one issue, provided the law was properly declared in the judgment directing that issue; and accordingly the House determined, 'that under the circumstances of this case, not-'withstanding the defect in sight of the Earl of Fife, proved upon the 'issues formerly tried in this cause, the signature of the instruments in 'question by notaries was not required by the statute 1579; and that the 'signature of the Earl of Fife was the proper signature to give effect to 'those instruments, according to the true intent and meaning of the sta-'tute; that the signature of the Earl of Fife appearing on the face of the 'said instrument, and the instruments being apparently so signed and 'attested, are in law probative deeds; and that to impeach such instru-

* See next case, Ogilvie v. Dundas.

'ments, as probative deeds of the Earl of Fife, the pursuer was bound to May 22, 1826.
'prove that the witnesses, or one of them, did not see the Earl of Fife
'subscribe the said instruments respectively, or hear him acknowledge
'his subscription thereto.' Now, it is very singular, if this House was of opinion that there was no occasion to hear him acknowledge his subscription thereto, that they should have stated that as one means of impeaching the instrument; because, that could not be an effectual means of impeaching the instrument, if it was clear that there should be no acknowledgment at all. I do not now lay any stress upon the word 'hear,' because, supposing there can be an effectual acknowledgment, still the matter would come to exactly the same conclusion, as it appears to me, upon the bill of exceptions. The judgment proceeds—'that to impeach 'the said instruments respectively, though in law probative instruments 'as the deeds of the Earl of Fife, on the ground that the Earl of Fife did 'not know the contents of such instruments respectively, when he sub-'scribed the same respectively, and that therefore the same were not 'respectively the deeds of the Earl of Fife, the pursuer was bound to 'prove that the Earl did not know the contents of such instruments 'respectively, when he subscribed the same respectively;' so that your Lordships' judgment went to this,—that if it were proved by witnesses that the deed was executed, the Earl of Fife must be understood to know the contents of it, and that it lay upon those who meant to impeach the deeds to prove the want of a due attestation, or to prove the want of knowledge of the contents;—'that it is not a solemnity 'required by law, that the said instruments respectively should have 'been read over to the Earl of Fife.' I remember great pains were taken by those who came to that conclusion; because the Earl of Fife, being as it were blind, no one can doubt, that one looks with great anxiety to the fact, whether a blind man knew the contents of the instrument. However, the House held, 'that it is not a solemnity required by 'law, that the said instruments respectively should have been read over 'to the Earl of Fife at the times of the execution thereof respectively, or at 'any other time or times; and that if such instruments respectively were 'duly executed and attested by the Earl, and in law probative instru-'ments, the knowledge of the Earl of the contents thereof respectively 'must be presumed, until the contrary should be shown. But that proof 'that the said instruments respectively were not read over to the Earl of 'Fife at the time of the execution thereof, is evidence to be received that 'he did not know the contents of such instruments respectively; but that 'such evidence is not conclusive evidence that he did not know the con-'tents of such instruments respectively, inasmuch as his knowledge of 'the contents of such instruments may be proved by other evidence, from 'which such knowledge may be inferred: That execution by the Earl of 'Fife, of the instrument purporting to be a deed of alteration of the deed 'of trust-disposition, sought to be reduced, supposing such deed of altera-'tion was executed and attested according to the statute; and that the 'Earl knew the contents thereof, is evidence to be received to prove that

May 22, 1826. 'the Earl of Fife did know the contents of such trust-disposition and 'deed of entail respectively, at the time when such trust-disposition and 'deed of entail appear on the face thereof to have been signed by the 'said Earl.' There are two propositions of law, your Lordships observe, laid down here:—The one, that the fact of not reading the deed over, is evidence to be received that he did not know the contents, but not conclusive evidence:—The other is, that an alteration by a subsequent deed, referring to the contents of the former deed, is evidence that he knew the contents of the former deed, because, if he knew the alteration he was making, that is evidence that he must know the contents of that former deed.

Then this House found, 'that the verdicts of the several Juries upon 'the several issues directed by the Court of Session were in some re-'spects inconsistent, and are insufficient to warrant the interlocutors re-'ducing the said instruments of trust-disposition and deed of entail re-'spectively: That the question properly in issue on the summons of re-'duction was, whether the instruments sought to be reduced, though appa-'rently probative instruments, and as such to be received as the deeds of 'the last Earl of Fife, were respectively the deeds of the Earl of Fife.' An issue, whether they were or were not the deeds of the last Earl of Fife, must, of course, include all facts that could be received in evidence, to show they were his deeds, consistently with the law of Scotland, as far as that law prescribes the solemnities that are to be observed in order to make the deeds correct. Then your Lordships proceeded to find, 'that 'the proof of facts, to show that the instruments, though probative instru-'ments, were not the deeds of the Earl of Fife, ought to have been given 'by the respondent, in support of his action for reduction of those instru-'ments, as probative deeds. It is therefore ordered and adjudged, that 'the said several interlocutors, complained of in the said appeal, in so 'far as these relate to the title and interest of the pursuer to insist in the 'present action, be, and the same are hereby affirmed; and, in other re-'spects, that the said interlocutors be, and the same are hereby reversed. 'And it is farther ordered, that the Court of Session in Scotland do di-'rect an issue, to try, whether the instrument of trust-disposition and 'deed of entail, both dated the 7th day of October 1808, sought to be 'reduced, being in law probative instruments, were not, or either of 'them was not, the deeds or deed of the Earl of Fife? And whether the 'deed of alteration of the 12th day of November 1808, being in law a 'probative instrument, was not the deed of the Earl of Fife; and that, 'upon the trial of such issue, the burden of proof, that such instruments, 'respectively, were not respectively the deeds or deed of the Earl of 'Fife, ought to be upon the respondent seeking to reduce the same: 'And it is further ordered, that the respondent be the pursuer in such 'issue, and the appellant defender; and that upon the trial of such issue, 'the said several instruments be produced, and be received as probative 'instruments, to be impeached by the respondent, by such evidence as he 'may be advised to offer, touching the same; and that thereupon the ap-

'pellant be at liberty to offer such evidence as he may be advised to offer May 22, 1826.
'in support of such instruments respectively;' that is, that the other party should have an opportunity of impeaching them, and that that evidence impeaching them was to be answered by evidence on the other side. Then your Lordships observe, that the deed of October having been followed by the deed of alteration in November 1808, the judgment goes on to state further, 'for that purpose,' that is for the purpose of supporting such instruments of October, 'the appellant be at liberty to offer the 'deed of alteration of the 12th day of November 1808, as evidence in 'support of the instruments of trust-disposition and deed of entail of the '7th day of October 1808, so sought to be reduced, if the appellant shall 'think fit so to do.'

My Lords, attending to the effect of this judgment, there are two leading points, if I may so express myself: The one is, whether the deed was properly attested; the other is whether my Lord Fife knew the contents of the former deeds. With respect to the first, if it be the law of Scotland, that where there is a witness whose name is annexed as an attesting witness, and it is clear that that witness did not see the granter of the deeds subscribe them, that witness must have an acknowledgment made to him by the granter, either by word or what is here called virtually; and by another term not easily explained, 'an equipollent' acknowledgment: then, to be sure, if the deed of November 1808 is only to be taken as an acknowledgment by Lord Fife, that he was aware of and knew the contents of the instrument, when he executed the deed in October 1808, that would not bear at all upon the fact, Whether he did or did not say to Mr Wilson (who is a subscribing witness to it), or Whether he did or did not otherwise virtually acknowledge to him, that that deed of October 1808 was his deed; because his executing the deed of November 1808 (unless that was accompanied by some declaration) could not possibly be such an acknowledgment to Mr Wilson, who had subscribed the deed of October 1808, but not in the presence of Lord Fife. There is, however, no proof at all that Lord Fife had told him that he had executed that deed, or in any way acknowledged it as his instrument. With respect to the second point in the issue, namely, Whether my Lord Fife knew the contents of the deeds of October 1808, his execution, duly proved, of the deed of November 1808 might be most material evidence. It appeared, therefore, to be material to lay it before the Jury, that the issue might be tried; and it was open to the defender upon this trial to produce the deed of November 1808, not merely for the purpose of letting the Jury see the instrument (the validity of which they were to try), but for the purpose of calling upon the Jury to say that my Lord Fife knew the contents of the deeds of October. Provided they could prove the due attestation of the deeds of October 1808, they might offer that deed in evidence to show that Lord Fife, in November 1808, knew the contents of the deeds of October 1808; and therefore, laying a probable case and a strong case before the Jury, to show that blind as he was (if it was made out that he understood the deed

May 22, 1826. of November 1808), he must know the contents of the deed of October 1808. But, my Lords, if on the trial of this cause they did not think proper to avail themselves of the liberty so given, by producing it (the cause being got to that state that they might have produced the deed of November 1808 as evidence to the Jury), then I apprehend they never can make anything relative to that deed of November 1808 a part of the subject of the bill of exceptions:—And here give me leave to say (begging again to protect myself as far as I can from being supposed to act on English ideas in a Scotch cause), in a suit of this nature, in which trial by jury is introduced, we must advert a little to the principles and the practice of English law, with reference to that subject. If my recollection is right, and it has been refreshed by an excellent friend of mine, by a reference to the act of Parliament, it is extremely material, in the inception of this business about trial by jury in Scotland, to mark the distinction that the legislature has thought proper to make between new trials and bills of exceptions; because if there is anything that appears upon these bills of exceptions, that ought to have been, or could have been, made a subject of an application for a new trial, let it be remembered what a degree of mischief we shall do in judgment, if, after the legislature has said there shall be no appeal on the refusal or grant of a new trial, you can agitate the same matter in the shape of a bill of exceptions, exactly as if there had been a motion for a new trial in the Court below. Great care must therefore be taken upon that subject.

My Lords, the parties go to the Jury upon this, and the trial proceeds, and these bills of exceptions both being taken, I understand, by the same party, relating to the matter, or part of the matter of the direction of the Judge as to the same point; and what is somewhat new to me, one at least of those bills of exceptions does not state what it was that the Judge said. The other does state what it was that he said. The form in which these bills of exception come to us strikes me as a little extraordinary. The form of them has not, however, in Scotland been considered as liable to objection, for the Judges of the Jury Court have signed both these bills of exceptions; and one great difficulty here, and perhaps the most material, is to know how to reach the matters (as we English lawyers say) upon the record. The first bill of exception states the issue directed. It states, in the usual form, that the Jury came together; 'That the said defender did not adduce any evidence on his part 'at the trial;' that the two instrumentary witnesses had given certain testimony, and that 'upon this testimony of the two subscribing witnesses 'to the said deeds, the Lord Chief Commissioner observed to the Jury, 'that it was their duty and province to consider and make up their 'minds on the credit that was due to the witnesses; that he thought it 'right to observe, that the witness George Wilson came to disaffirm 'his own solemn act; that his testimony must, therefore, be weighed 'with all the suspicion which attaches to a witness standing in such cir-'cumstances; that they must likewise weigh the credit due to the tes-

'timony of the other witness, Alexander Forteath Williamson:—That May 22, 1826.
'in directing the Jury as to the said Earl's alleged acknowledgment of
'his subscription to the said deeds, the Lord Chief Commissioner did
'tell the Jury, that when an attesting witness has not seen a granter of a
'deed sign the deed, the granter of the deed must acknowledge his sub-
'scription to the person who attests the deed, otherwise the deed is void
'in law: That in this case he was of opinion, that there was undoubted
'evidence (and it was admitted), that there had been no acknowledg-
'ment by words to the witness, who did not see the Earl sign.' Your Lordships will observe, that in the judgment of this House, the species of acknowledgment pointed at is 'hearing.' I state the case, however, without any influence arising from that observation, for the present. It then proceeds, 'And the Lord Chief Commissioner did then observe to the 'Jury in effect as follows:—That in considering any other acknowledg-
'ment, that it was his opinion the acknowledgment must be clear and
'explicit, and that he had not found any case in which a virtual acknow-
'ledgment, or equipollent, had been sustained; but that it was not ne-
'cessary to carry the doctrine so far in this case, as, according to the evi-
'dence of the two witnesses called by the pursuer, if they, the Jury, belie-
'ved either of them, it did not appear that there was any acknowledgment
'either express or virtual: That the Counsel for the said defenders did
'except to the said direction—in respect that the said Lord Chief Com-
'missioner had delivered it as his opinion to the Jury, "that an ac-
"knowledgment, when a witness had not seen a party sign a deed, must be
"clear and explicit, and that he had not found any case in which a vir-
"tual acknowledgment, or an equipollent, had been sustained."' Your Lordships observe, this opinion consists, if I may so express myself, of these statements,—that an acknowledgment when a witness has not seen a party sign a deed, must be clear and explicit, and that he (the Lord Chief Commissioner) had not found any case in which a virtual acknowledgment, or equipollent, had been sustained;—but that, in this case, it did not appear that there was any acknowledgment, either express or virtual. It is not easy to expound this direction quite satisfactorily, because if there has been no such thing as a virtual acknowledgment, one does not understand what necessity there was for considering whether that could be sustained, unless it was clearly equivalent to an express acknowledgment. The Lord Chief Commissioner, however, considering that 'The direction of a Judge, given to a Jury, could not be separated
'into parts, but must all be taken together, and must be construed
'with the context, and have the sense put upon it, that arises out of the
'observations which accompany it, and that a particular sentence, pas-
'sage, or expression, cannot be selected and stated by itself, as constitu-
'ting the direction of a Judge, objected to the exception as taken; and
'to secure against any misconception as to the meaning of his direction,
'the Lord Chief Commissioner did then and there put his direction in
'writing, and read it to the Jury, as next herein set forth:—"That in
"this case, he was of opinion, that there was undoubted evidence (and it

May 22, 1826. "was admitted), that there had been no acknowledgment by words to "the witness, who did not see the Earl sign: That in considering any "other acknowledgment, he told the Jury, that it was his opinion, the "acknowledgment must be clear and explicit, and that he had not found "any case in which a virtual acknowledgment, or equipollent, had been "sustained."'

Now, taking the meaning of that to be, that if there were no acknowledgment by words, there must still be an acknowledgment somehow or other, made out by some evidence, which must be clear and explicit,—that is to say, that supposing the individual not to say, 'I acknowledge this 'to be my deed,' he must still use some other word, or do some other acts, which, the Jury might say, would have the same effect as if he said, 'I do acknowledge this to be my deed;' if it was still an explicit acknowledgment on his part, I agree in that which was so stated, if it was meant to be said, that any other acknowledgment, except an express declaration, must be an acknowledgment as clear and explicit as an acknowledgment directly in words would be. As to the effect of that acknowledgment, the Lord Chief Commissioner went on to say, that 'he 'did not find any case in which a virtual acknowledgment, or equipollent, 'had been sustained, but that it was not necessary to carry the doctrine so 'far in this case, as, according to the evidence of the two witnesses called 'by the pursuer, if the Jury believed either of them, it did not appear that 'there was any acknowledgment, either express or virtual.' Now I apprehend if a Judge goes on to do that, which I believe may sometimes be as useful a part of the exercise of his duty as any other, namely, to give his opinion upon the effect of the evidence, what he says as to the effect of the evidence is not the subject of a bill of exceptions. The Jury may adopt his opinion, or they may refuse to adopt his opinion. If they act upon his opinion, and in virtue of his direction find a verdict contrary to the effect of the evidence, that forms the ground of a motion for a new trial, but it does not form the ground of a bill of exceptions.

The learned Judge says, It is not necessary for you to carry the doctrine so far in this case, whether, if there were a virtual or an equipollent acknowledgment, it would or would not do in law, as to which he says, I have found no case establishing that it will do; but he accompanies that with stating, that whether that would do, or would not do, there was not, in his opinion, evidence either express or virtual; and when the cause was tried, there was no interposition on the part of the counsel contending against my Lord Fife. There was no interposition on their part to say, 'we desire the question, whether there was such evidence, should be sta-'ted to the Jury, as the question on which they are to decide;' but the learned Judge in so stating himself must be understood, according to our habits and practice, to be stating his own opinion, and leaving them to judge, without saying further, whether they think that opinion right. If they had been of opinion that there was no acknowledgment by word, but that there was that which they thought equal to an acknowledgment by word,—that is, if they believed the witnesses, and thought that was the

conclusion they ought to draw from their testimony, they were at liberty to do so. The truth therefore, I think, is, that the Judge just stated, that upon the evidence there is nothing which can be called an acknowledgment, particularly in the case of a blind man; there is nothing which can be said to be an acknowledgment on his part to that individual witness that he had subscribed that deed; but there is another question, a question of law, whether such an acknowledgment is necessary to the validity of the deed; or putting it in other words, whether the absence of such an acknowledgment infers nullity of that deed, is a pure question of law. The bill of exceptions then goes on to state, 'that he did then tell the Jury, that if they 'believed either of the witnesses, he was of opinion, that there was no 'acknowledgment by the said Earl of his said subscription to the deeds of 'the 7th October 1808, to the said George Wilson; in which case, the 'said deeds were not the deeds of the said Earl, and they would so find 'by their verdict; that the Jury did thereupon find a verdict for the pursuer, by delivering it as their verdict "that the instruments of trust-disposition and deed of entail, both dated the 7th day of October 1808, 'were not the deeds of the Earl of Fife."' May 22, 1826.

Your Lordships will observe upon what I have now read (which is the whole of the statement in the bill of exceptions), that the deed of November 1808 was never tendered as evidence on their part; but it is stated, that the counsel for the defenders 'did except to the directions of the 'Lord Chief Commissioner, in so far as it related to the acknowledgment 'by the said Earl to the said George Wilson of his subscriptions to the 'said deeds; and insisted that the said pursuer was not entitled to recover a verdict on the said issue, in respect that the deeds of the 7th October 1808 were the deeds of the said Earl; and the said counsel did 'then and there propose to the said Lord Commissioner to sign the said 'bill of exceptions, according to the form of the statute in such case 'made and provided,' and that accordingly he did so sign it;—so that that which is here insisted by the Counsel is, that the pursuer was not entitled to recover a verdict upon the said issue, in respect that the deeds of the 7th October 1808 were the deeds of the said Earl. Whether that is the language which ought to have been put into a bill of exceptions, may, I think, admit of some doubt; because it does not state the grounds on which they insisted that they were the deeds of the Earl. I apprehend, that the way in which we should state it here (if we meant to insist that the deed was a good deed, or that nullity was not to be inferred, by reason that there was no acknowledgment of that deed by the Earl of Fife to this witness), would be, that he was entitled to recover a verdict on the issues, in respect that the deed of the 7th October 1808, notwithstanding the Earl's signature had not been proved to be written in the presence of the witnesses, and notwithstanding the absence of such evidence of acknowledgment, was the deed of the Earl.

My Lords, the other bill of exceptions appears to me to be open to the same difficulty, because it does not appear that one single word of about nine-tenths of what was said by the Chief Commissioner is inserted, and

May 22, 1826. I apprehend, that every part of what falls from a Judge, with reference to that topic which forms the subject of the bill of exceptions, ought to be stated on the bill of exceptions. These bills of exceptions afterwards came before the Judges of the Court of Session. But the Division which had this matter before them for their consideration, unanimously overruled these bills of exceptions.

Now, my Lords, with respect to anything I might observe upon the bills of exceptions and the form of them, I think the matter to be attended to, may be stated thus. First, that we should endeavour, and take a great deal of care, if we can consistently with what is the law relative to bills of exceptions, to get at the justice of the case. On the other hand, it is of very great importance certainly, that in this, I think, the first bill of exceptions which comes to us, at least I do not recollect any other, there may have been some in my absence,—but it appears to me, that in respect of this the first bill of exceptions which comes to us, it is of very great importance that we should take a great deal of care, that it is put into that form which is right, because this may be brought as a precedent with respect to bills of exceptions in future. I think it cannot but have occurred to your Lordships in hearing the argument, that there has been a great deal stated, that might be properly enough addressed to this house as a ground for granting a new trial, but which does not appear to apply itself very well to a bill of exceptions. The case has been very ably argued, and in conformity to what I said in the beginning of the few words I have addressed to your Lordships, I beg again to say, that according to my experience, the knowledge of the gentlemen who practise at the Scotch Bar, as well as the knowledge of the Judges on the Scotch Bench, is such as entitles both of them to the highest respect. I have always thought so, and am happy to have an opportunity of declaring so.

My Lords, in dealing with this case, we must take great care that this House is not involved in the execution of duties, the casting of which upon your Lordships may lead to a great deal of irregularity and mischief. At the same time, I should be very sorry if this case were to be decided anyhow upon a want of form in these two bills of exceptions, if by any manner of stating the matter upon the record, we could prevent that, and could prevent any impropriety in the forms of the bills of exceptions forming a precedent. My Lords, that is a circumstance that very much embarrasses me, because my mind having been fully as much engaged in the consideration of this cause when the judgment of this House was given in the year 1823, as ever it was engaged in the consideration of any subject on which it was my duty to deliver my opinion as a Judge, I confess, I feel great satisfaction in reading the language in which the Judges of the Court of Session, when these bills of exceptions were carried before them, stated their sentiments with respect to what is necessary as to the acknowledgment of a deed by the granter of that deed; and if the real exception meant to be taken in this case, is, that there is no necessity for the granter in some way or other acknowledging the deed to the witness who has subscribed, but has not subscribed in his presence,—if that be the real

ground of these bills of exceptions,—I am not one who can concur in think- May 22, 1828.
ing that a sufficient reason to affect the judgment. In truth, when you look at what passed here in the year 1823, and having gone through it, if you come to analyse all the parts of it; if you look at the printed Cases on the tables; if you look at the issues brought before the Court by the parties; and if you look at the language in which you thought it necessary to express your judgment;—it does appear to me, I own, that there is an insurmountable difficulty in contending now, that by the law of Scotland, where a man is a subscribing witness to a deed, and who did not see the party subscribe, or has not in some way or other had a clear acknowledgment from him that he executed that deed, does not infer a nullity. With these observations, my Lords, I shall endeavour to apply myself to the difficulties which arise upon the form of these bills of exceptions; and if on the great and material point anything suggests itself to me which ought to alter the opinion I have expressed, I shall not fail to intimate to your Lordships that alteration of opinion; but I do not at present think it likely I shall have any such alteration of opinion to state. I now beg to move your Lordships, that the final judgment stand over to the third day after the meeting of this House after the approaching recess, that is to say, Friday se'ennight.

Ordered accordingly.

Lord Chancellor.—My Lords, a case has lately been argued before your Lordships, involving a question of considerable importance; and also a question with respect to the form in which the matter was brought before us,—I mean the case of Sir James Duff against my Lord Fife. It will be in your Lordships' recollection that the title of certain estates depended upon the question, whether two deeds of October 1808, and one deed of November 1808, were the deeds of the late Earl of Fife. When this case was formerly before your Lordships, you came to the resolution that those instruments were to be considered as probative instruments, and that the individual who insisted that they were not the deeds of the Earl of Fife, was bound to prove that they were not to be considered as the deeds of the Earl of Fife. It is unnecessary for me again to go through the various circumstances under which it was considered that those deeds respectively were not to be considered necessarily as valid deeds, though they were to be considered as probative instruments. Your Lordships' judgment, which sent back the matter to the consideration of the Court of Session, pointed out, with great particularity, what other proof was to be taken, which should or should not be considered evidence for the purpose of proving the fact, either negatively or affirmatively. The matter came on afterwards to be tried, and that trial has produced the bill of exceptions, the substance of which I am now about to state to your Lordships.

My Lords, there are two appeals, and, according to the Act of Parliament, to each appeal is annexed a bill of exceptions, and I apprehend that this act of Parliament was founded upon an analogy to what is required in the English law, namely, that the record, when brought up here,

May 22, 1832. must bring up the whole matter. There is a bill of exceptions in the Court below, and error being imputed to the judgment in the Court below, the record brings up the whole matter. In this case two bills of exceptions having been taken (which it seems has been adopted by a supposed analogy to our mode of proceeding);—there are two appeals, each bringing up a bill of exceptions, and I take notice of that circumstance, because a great objection has occurred in the course of the argument, not only upon the point, whether the Lord Chief Commissoner gave an improper direction to the Jury Court; but whether we have got these matters before us in such a way that we can either affirm his directions, as having been proper and material, or negative his directions, as having been improper.

Now, my Lords, there is no doubt, I apprehend, that in the case of a bill of exceptions, according to our proceedings, we would have had only one. But a bill of exceptions may contain more than one objection to the direction of the learned Judge, who gives his opinion in point of law, on the admissibility of evidence on the trial; and likewise, what is more distinctly under the head of doctrine of law, there may be exception more than once to what a Judge says in his direction to the Jury. But yet, according to our notions of practice, all those exceptions are recorded in one bill of exceptions. I have not been able to find any instance in which the different objections are stated in more bills of exceptions than one. If that were the course, it would seem to follow that if there were three or four or five points in which the judgment was thought to be wrong, there might just as well be as many bills of exceptions as amount to the number of errors that were imputed to it. In this case the bills of exception are those which I have now in my hand; they are both taken by the same party. The first bill of exceptions is in the following terms: 'Whereas by a special interlocutor, pronounced by the Lords of the Second Division of the Court of Session in this cause, bearing date the 19th 'of March 1824, their Lordships appointed the following issue to be sent 'to the Jury Court, to be there tried by a Jury, viz. whether the instruments of trust-disposition and deed of entail, both dated the 7th October '1808, sought to be reduced, being in law probative instruments, were 'not, or either of them was not, the deeds or deed of the Earl of Fife; and 'whether the deed of alteration of the twelfth day of November 1808, 'being in law a probative instrument, was not the deed of the Earl of 'Fife.' Your Lordships will recollect the verdict does not dispose of that; but that is not a matter with which we have now to do; and it will be in the recollection of the noble and learned Lord now sitting at the table, that this House thought it right to give to the party, who insisted that the deeds of October 1808 were the deeds of my Lord Fife, a liberty to produce the deed of the 12th November 1808 (which was a deed of alteration of those of the 7th October 1808) in evidence, if they thought proper to support the deeds of October 1808 as the deeds of my Lord Fife. They did not think proper to tender that instrument of November 1808 in evidence, either for that purpose or any other purpose; but the non-production of that deed, and the liberty to produce it as evidence, is not

that which can form the proper matter of a bill of exceptions; there is no May 22, 1828.
doubt about that. Then the bill of exceptions goes on to state the usual form of the swearing the Jury, and so on, which may be passed over, and 'that the said defenders did not adduce any evidence on their part, at the 'said trial, that the said deeds of 7th October 1808, in the first issue 'mentioned, were signed by the said Earl on the morning of the 7th Octo-'ber 1808, in the breakfasting-parlour, or low parlour of Duff-house, soon 'after the hour of breakfast: That the two subscribing witnesses to the 'said deeds, Alexander Forteath Williamson, and George Wilson, were 'both examined on the part of the pursuer, and did both give in evidence, 'that the said George Wilson did not see the said Earl sign the said deeds.' Your Lordships will recollect that it was very much discussed at the Bar before the remit was made to the Court of Session, what the law required in order to render that which was a probative instrument a good deed of the party, whose probative instrument it was—I mean with respect to the attesting witnesses—and this House were of opinion, that if the instruments appeared to be properly attested, the instrument was therefore probative; but, on the other hand, that if it could be shown that the granter of the deed did not subscribe in the presence of witnesses, or, subscribing in the presence of one of the witnesses, that if he (the granter) did not acknowledge to the other, that that instrument was his deed, there would not be any sufficient attestation, and the direction of this House was expressed accordingly. I mention that fact, having looked back to all the Cases we had on the table on the former occasion, and it thence appears that we had that under our very anxious consideration; and if I had any doubt at all, I think it would be expressed most properly thus, that instead of using the words, 'did acknowledge it to be *his* deed in the pre-'sence of witnesses,' it is stated in your Lordships' judgment, 'did hear him 'acknowledge it:' that is, 'the other witness did hear him acknowledge it 'to be *his* deed,' it being contended in the papers upon the former occasion, that there should be either express acknowledgment by hearing, or a virtual acknowledgment; and the circumstance of the liberty to give in evidence the deed of November 1808, must have been a liberty that was open to that consideration.

The bill of exceptions then proceeds:—'And it was further given in evi-'dence, by both the said witnesses, that the said George Wilson did not 'hear the said Earl acknowledge his subscription to the said deeds; and 'that the said Earl did not make any verbal acknowledgment of his 'subscription to the said two deeds to the said George Wilson.' I stop for a moment to remark here, that if the counsel for Sir James Duff thought proper to offer in evidence the instrument of November 1808, as amounting to a virtual acknowledgment on the part of the Earl of Fife, of the instrument of October 1808, *that*, without something more presented to the Jury, could afford no ground for supporting those deeds.

One of the said witnesses, Alexander Forteath Williamson, gave in evi-'dence, that the said deeds, after they had been signed by the said Earl 'in the breakfasting-room, or low parlour in Duff-house, as aforesaid, and

May 22, 1826. 'then and there attested by the said Alexander Forteath Williamson, who 'saw the said Earl sign the said deeds, were taken by one Stewart Sou- 'ter, a factor, or man of business employed by the said Earl, to a room 'in the said house, called the Charter-room: That the said George Wil- 'son gave in evidence, that the said Stewart Souter, in the forenoon of the 'said 7th day of October 1808, did bring the said deeds into the Charter- 'room, and did then and there dictate the testing-clause to him, the said 'George Wilson, who wrote it in scroll to the dictating of the said Stewart 'Souter; and that the said Stewart Souter, after the scroll was written 'as aforesaid, did dictate the testing-clause from the scroll; and that he, 'the said George Wilson, did write the said testing-clause to such dicta- 'tion on the said deeds, and, at the same time, did put his name to the 'said deeds, as a subscribing witness; and that, during all the time the wit- 'ness was employed as aforesaid, or at the time the said witness put his 'name to the said deeds, as a subscribing witness as aforesaid, the said 'witness never saw the said Earl come into the said Charter-room, and 'that he the said Earl did not come into the said Charter-room during 'the time aforesaid:' Your Lordships will just allow me to put you in mind, that the state of the Earl's eye-sight was such, that he could not discover what the instrument was, although undoubtedly your Lordships were of opinion, and most rightly of opinion, that a blind man might well execute a deed. 'That the said Alexander Forteath Williamson gave in 'evidence that the said Earl, after signing, parted with the said deeds, and 'they were taken from him as aforesaid, by the said Stewart Souter, in 'the low parlour aforesaid, and that the said Earl never came in contact 'again with the said deeds, until after the said George Wilson had put his 'name as subscribing witness to the said deeds: That the said George 'Wilson gave in evidence, that he was bred to business as a writer, with 'Mr Young, writer in Banff; that in the year 1804, he entered into the 'service of the late James Earl of Fife, as a factor or clerk, and continued 'in that service until the death of the said Earl: That he had often at- 'tested deeds of the said Earl, as a witness to the said Earl subscribing 'the deeds; that he had often done so, when he had not seen the said 'Earl subscribe the deeds, which he attested as a witness; and that, on 'such occasions, he never heard the said Earl acknowledge his subscrip- 'tion to him, George Wilson, in those cases in which he did not see the 'said Earl sign the deeds which he attested: And the said Alexander 'Forteath Williamson gave in evidence, that within a short time after he 'had attested the said deeds as aforesaid, he, the said Alexander For- 'teath Williamson, went to the Charter-room, where he found the said 'George Wilson writing at the window, to the dictating of the said Stewart 'Souter: That the witness placed himself at the side of the fire-place, 'which was on the opposite side of the room from the desk where the other 'witness was writing to the dictating of the said Stewart Souter, as afore- 'said: That he, the said Alexander Forteath Williamson, conjectured 'that the said Stewart Souter was dictating the testing clause to the said 'deeds; but that he, the said witness, did not hear any of the words that were

'spoken by the said Stewart Souter: That after the said Alexander For- May 22, 1826.
'teath Williamson was in the Charter-room, the said Earl came into the
'said room, and sat down on a chair, at the opposite side of the fire-place
'from that where the witness stood: That the said Earl was placed at
'the same distance as the witness from the desk where the said Stewart
'Souter was dictating to the said George Wilson: That the witness did
'not hear Lord Fife acknowledge his subscription: That if Lord Fife
'said anything, he had no recollection of it, or of anything addressed at
'all, by Lord Fife to Wilson—if anything, he does not recollect it—or
'that anything was addressed to the said Earl,—and that the said Earl
'was not in a situation to hear the dictating which was taking place at the
'desk in the window: That in regard to the eye-sight of the said Earl,
'it was admitted by the counsel on the part of the defenders, that the said
'Earl, at the date of the said deeds, was not totally blind, though he could
'scarcely distinguish between light and darkness, and was at that time
'incapable of reading any writing, written instrument, or printed book,
'and could not discover whether a paper was written upon or not.' This
was the whole of the testimony.

The bill of exceptions then states, 'that upon this testimony of the
'two subscribing witnesses to the said deeds, the Lord Chief Commis-
'sioner observed to the Jury, that it was their duty and province, to con-
'sider and make up their minds on the credit that was due to the wit-
'nesses: That he thought it right to observe, that the witness, George
'Wilson, came to disaffirm his own solemn act;—that his testimony must,
'therefore, be weighed with all the suspicion which attaches to a witness
'standing in such circumstances: That they must likewise weigh the cre-
'dit due to the testimony of the other witness, Alexander Forteath Wil-
'liamson: That in directing the Jury as to the said Earl's alleged ac-
'knowledgment of his subscription to the said deeds, the Lord Chief
'Commissioner did tell the Jury, that when an attesting witness has not
'seen a granter of a deed sign the deed, the granter of the deed must ac-
'knowledge his subscription to the person who attests the deed, otherwise
'the deed is void in law: That in this case, he was of opinion, that there
'was undoubted evidence (and it was admitted), that there had been no
'acknowledgment by words to the witness, who did not see the Earl
'sign. And the Lord Chief Commissioner did then observe to the Jury,
'in effect as follows:—That in considering any other acknowledgment,
'it was his opinion, the acknowledgment must be clear and explicit,
'and that he had not found any case in which a virtual acknowledgment
'or equipollent had been sustained;'—(What is the exact meaning of this
last sentence, it is perhaps difficult to determine, but it appears to me in
the result not to be material.) 'But that it was not necessary to carry
'the doctrine so far in this case, as, according to the evidence of the two
'witnesses called by the pursuer, if they, the Jury, believed either of
'them, it did not appear that there was any acknowledgment, either ex-
'press or virtual: That the counsel for the said defenders did except to
'the said direction—In respect that the said Lord Chief Commissioner

May 22, 1826. ' had delivered it as his opinion to the Jury, " that an acknowledgment,
" when a witness had not seen a party sign a deed, must be clear and expli-
" cit, and that he had not found any case in which a virtual acknowledg-
" ment or an equipollent had been sustained." But the Lord Chief Com-
' missioner,' (and in this he appears to me to have taken quite the right course,) ' considering that the direction of a Judge given to a Jury, could ' not be separated into parts, but must all be taken together, and must be ' construed with the context, and have the sense put upon it, that arises ' out of the observations which accompany it, and that a particular sen-' tence, passage, or expression, cannot be selected and stated by itself, as ' constituting the direction of a Judge, objected to the exception as taken; ' and to secure against any misconception as to the meaning of his direc-' tion, the Lord Chief Commissioner did then and there put his direction ' in writing and read it to the Jury, as next herein set forth:—" That in
" this case he was of opinion, that there was undoubted evidence (and
" it was admitted), that there had been no acknowledgment by words to
" the witness, who did not see the said Earl sign: That in considering
" any other acknowledgment, he told the Jury, that it was his opinion,
" the acknowledgment must be clear and explicit, and that he had not
" found any case in which a virtual acknowledgment or equipollent had
" been sustained; but that it was not necessary to carry the doctrine so
" far in this case, as, according to the evidence of the two witnesses called
" by the pursuer, if they, the Jury, believed either of them, it did not ap-
" pear that there was any acknowledgment, either express or virtual."'

My Lords, it was admitted at the Bar, and very properly admitted at the Bar, that it does not form the matter of a bill of exceptions, that a Judge gives an opinion with respect to the evidence, which opinion is not the true result of the evidence; that a matter of that kind might be the ground of a motion for a new trial, but is not a ground for a bill of exceptions.

The bill of exceptions proceeds: ' That after reading what immediately ' precedes to the Jury, he told the Jury, that they were to consider what ' he read to them as his directions on the part of the case which related ' to the alleged acknowledgment of the subscription to the said deeds, by ' the said Earl: And the Lord Chief Commissioner did then tell the ' Jury, that if they believed either of the witnesses, he was of opinion that ' there was no acknowledgment by the said Earl of his said subscription ' to the deeds of the 7th October 1808, to the said George Wilson; in ' which case, the said deeds were not the deeds of the said Earl, and they ' would so find by their verdict: That the Jury did thereupon find a ver-' dict for the pursuer, by delivering it as their verdict, " That the instru-
" ments of trust-disposition and deed of entail, both dated the 7th day of Oc-
" tober 1808, were not the deeds of the said Earl of Fife."' Your Lordships perceive this is a passage which is open to the remark, that the learned Judge made no observation on the deed of alteration. That, however, is not a part of the bill of exceptions. ' But the counsel for the defenders did except to ' the direction of the Lord Chief Commissioner, in so far as it related to

'the acknowledgment, by the said Earl, to the said George Wilson, of his subscription to the said deeds, and insisted that the said pursuer was 'not entitled to recover a verdict on the said issue, in respect that the 'deeds of the 7th October 1808 were the deeds of the said Earl. And 'the said counsel did then and there propose to the said Lords Commissioners to sign the said bill of exceptions, according to the form of the 'statute in such case made and provided: And thereupon the said Lords 'Commissioners, at the request of the said counsel for the said defenders, 'did respectively sign the said bill of exceptions, pursuant to the said statute in such case made and provided, on the said 9th day of March, in 'the year of our Lord 1825, and in the sixth year of his present Majesty's reign.' May 23, 1828.

Your Lordships observe, that the ground of exception is this, that they excepted to the direction of the Lord Chief Commissioner, in so far, and so forth. Now, as I understand this exception, it is this,—that the Lord Chief Commissioner was wrong in telling the Jury that there must be an acknowledgment to Wilson as one of the witnesses. With respect to what the Lord Chief Commissioner stated as to the virtual acknowledgment, it is this,—that he was of opinion upon the evidence, it being admitted, that there was no express acknowledgment in words, that if they (the Jury) believed those witnesses, or either of them—though his opinion was that there was no proof, for he only states it thus—though he was of opinion there was no proof of acknowledgment by the Earl of his subscription to the deeds of the 7th October 1808 to Wilson, it was unnecessary to go into that, because if the Jury believed those witnesses, or either of them, there was no acknowledgment, either express or virtual.

It appears, therefore, upon this bill of exceptions, that the Judge informed the Jury there was a great irregularity and great impropriety in having this deed attested without an acknowledgment being made, and that non-acknowledgment to one of the witnesses entailed nullity upon the deed. I feel very much satisfied with the circumstance that my noble and learned friend happens to be present upon this occasion, because I think we were both satisfied upon the former hearing, that either the witness must subscribe in the presence, or there must be some acknowledgment of the party that it was his deed. That proposition may be said to have undergone consideration in this House twice, and I humbly state it to your Lordships (not being unwilling to state that it was an erroneous opinion if I felt it to be so),—and I state it, notwithstanding all that I have heard urged at the Bar, to establish that it was not necessary there should be an acknowledgment of the deed to the witness, who did not subscribe in the presence,—that, in my opinion, it was necessary there should have been such acknowledgment; and that if there was no such acknowledgment, the want of acknowledgment does entail nullity upon the deed; and that therefore this direction was right.

My Lords, the other bill of exceptions by the same party not stating, as it ought to do, the whole of the directions of the learned Judge, says this: 'The said counsel for the said defender contended, that although the

May 22, 1826. 'Jury should be satisfied that the evidence given on the part of the pursuer established that the granter of the deed had not acknowledged his subscription to one of the witnesses who did not see him subscribe the said deed, that the said deed was not null, but was a good and valid deed, and the deed of the said granter the Earl of Fife; and the said counsel did then and there insist that there must therefore be a verdict in favour of the defenders in respect to the said deeds; but the Lord Chief Commissioner did direct the Jury, if they were satisfied that the evidence given, on the part of the pursuer, established that the granter of the deed had not acknowledged his subscription to the witness, who did not see him subscribe the said deed, to find, by their verdict, that the said deed was not the deed of the Earl of Fife; and did then and there tell the Jury, that the law required, in cases in which a witness does not see the granter of a deed sign the deed, that he must acknowledge his subscription to such witness, otherwise the deed is void in law, and therefore is not the deed of the granter.' It ought not to pass without observation, that the party (who is the same party as to the other bill of exceptions) does not in this bill of exceptions state wholly what was the direction of the learned Judge. Either the intent of this is to bring before the House the very same point; or if it was to bring before the House another point, it might have formed part of the same bill of exceptions; and one great difficulty that has arisen, has been to know what is to be done in point of form with the two bills of exceptions brought up. It appears to me, that the proper mode of disposing of them is to take notice that this objection in form had occurred, and that it was not necessary for the House to determine, whether the objections to the two bills of exceptions could or could not be supported, inasmuch as it did appear that such and such was the direction of the Lord Chief Commissioner, and the House was of opinion that that direction was right. It will require some special words to take care that the House shall not be understood to have determined that the objection to bills of exceptions thus brought before you, may not deserve consideration if any such matter should again occur; but being in possession of the merits of the case, and taking care that this shall not form a precedent for authorising this particular species of proceeding, unless your Lordships are of opinion that the direction of the learned Judge was wrong, it appears to me it will be right to determine in the manner I have suggested. I shall consider farther of the precise form of the proposition, and shall probably trouble your Lordships farther upon it when the House shall meet on Monday morning.

LORD CHANCELLOR.—My Lords, your Lordships have had before you, in the case of Sir James Duff *v.* the Earl of Fife, two appeals, which came before this House under very singular circumstances. Your Lordships will recollect, without my calling to your Lordships' attention the circumstances which took place upon the former appeal, what passed in this House, and the judgment which this House gave with respect to the trial of a certain issue. That trial has been had, and the appellant, Sir

James Duff, has brought up to this House two appeals, and to each of them a bill of exceptions appended according to the act of Parliament—the Court of Session having overruled these bills of exceptions. May 22, 1826.

My Lords, in the course of the hearing at the Bar, a considerable difficulty occurred with respect to the form in which these appeals were brought before us. I believe I may venture to say (speaking in the presence of noble and learned Lords well acquainted with the subject), that where there is a bill of exceptions in our Courts here, the record which is brought up containing the bill of exceptions may certainly contain several heads of exceptions; but I am not aware of an instance of two bills of exceptions having been brought up by different appeals—which is like bringing up two records—nor am I aware, that according to our modes of proceeding, where a direction is given by a Judge which is excepted to, you can split that direction into two parts, and take two exceptions to it. That, however, seems to have been done in the present case. My Lords, I should extremely regret (if your Lordships are satisfied with respect to the law upon the subject), that the case should go back on any such point of form; and, therefore, with a view to save the precedent, I would propose to your Lordships, that in each of these appeals the following judgment should be pronounced, namely, to declare that this House does not feel it necessary to pronounce any judgment upon the objections which have been stated in the course of the hearing of this matter to the bill of exceptions annexed to this appeal, by reason of there being another bill of exceptions tendered on behalf of the same party annexed to another appeal, or by reason of the objection in point of form,—this House being of opinion that the Lord Chief Commissioner's directions to the Jury, stated in the bill of exceptions, cannot be justly excepted to. The effect of this will be, to affirm the judgment complained of: and then to adopt the same form in the other appeal. That will save the point, I think, with respect to the precedent. Upon looking at the bills of exceptions, the direction in point of law, stated in the one, appears to be a part of that stated in the other. It does not appear to me that the Lord Chief Commissioner's direction is objectionable. I do not apprehend that if the observation of the Judge relates to the effect of the evidence,—not that I mean to intimate that that which was stated to the Jury upon the effect of the evidence in this case, can be represented to be wrong—but if it were, I do not apprehend that that would be the proper subject of a bill of exceptions. It might be a proper subject for a motion for a new trial; but it appears to me that no Jury could reasonably disagree, if the opinion of the learned Lord Chief Commissioner was correct, that if they believed either of the witnesses, there was no express acknowledgment of the deed of my Lord Fife to the witness of the name of Wilson; nor, on the other hand, if they believed either of the witnesses, could it be said there was any virtual acknowledgment. Upon the whole, justice appears to me to have been done, and if this sort of judgment will save the objection that might have been made in point of form, which it appears to me it will, I think it will be right to give that kind of judgment in both cases. I think we ought in each of these cases to give £50 costs.

May 22, 1826.

Appellants' Authorities.—8. Reg. Maj. 8.—Town of Edin. March 11, 1680. (14690.) 1540, c. 117. 2. Ersk. 2. 7. 1579. c. 80. 1581. c. 4. 1593. c. 179.—Novell. 73. 4.—Sheriff, July 8, 1622. (16877.)—Colvill, July 15, 1669. (16882.)—Falconer, Feb. 3, 1665, (16883.)—Dow, Jan. 4. 1668. (16884.)—Cunningham, Dec. 5, 1665. (17019.)—Sharp and Maxwell, Feb. 2, 1710, (17027.)—Ogilvie, Feb. 22, 1676, (16860.)—Dishington, March 12, 1628. (17015.)—Duke of Douglas, Jan. 6. 1747. (17035.)—Weir, Nov. 29, 1609. (17011.)—Redpath, June 24, 1611. (Ib.)—Hay, June 7, 1709. (17025.)—4 St. 20. 22.—Bell on Testing Deeds, 272, 246, et seq. and cases there.—Buchan, June 26, 1823.—(Shaw and Dunlop, vol. II. No. 410.)—Smith *v.* Bank of Scotland, 1821.—(House of Lords, 1824.)

Respondents' Authorities.—Novell 73. de Inst. de Caut. et Fidel.—Reg. Maj. 2. 38.—1540. c. 117.—1579, c. 80.—1681, c. 5.—Mackenzie's Obs.—Kilk. in D. of Douglas, Art. 8. *v.* Writ.—Bell on Testing of Deeds.—1. Bank. 11. 28. and 10. 229.—3. Ersk. 2. 7.—Stevenson, 1682, (16886.)—Blair and Peddie, 1684. (13942.)—Campbell, Nov. 1698. (16887.)—Phillips, June 13, 1738. (Elchies, Nov. 10, *v.* Witness.)—Shaw *v.* M'Phail, (mentioned A. S. Feb. 6, 1765.)—Young and Ritchie, Feb. 2, 1761. (17047.)—Walker *v.* Adamson, June 8, 1716. (16896.)—Sibbald, Jan. 18, 1776. (Bell, p. 245.)—Frank, June 10, 1809. (F. C.)

J. CHALMER—SPOTTISWOODE and ROBERTSON, Solicitors.

No. 20.

SIMON TAYLOR OGILVIE, Esq. Appellant.—*Shadwell*—*Buchanan.*

BARBARA DUNDAS and MARGARET LINDSAY, and Others, Respondents.—*Adam*—*Keay.*

Right in Security—Heir and Executor.—A husband, possessed of property in Jamaica, having, by marriage-articles, bound himself to secure to his wife, in case of her surviving him, an annuity of £400, payable out of his Jamaica estates; and binding himself, in the event of purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuity; and having bought lands in Scotland, but having taken the titles to himself and his heirs alone, and having died,—Held (reversing the judgment of the Court of Session), 1. that the annuity constituted a proper burden on the Jamaica estate, and not on the Scotch estate; and, 2. that a party taking the former under a testamentary deed, had no relief against the heir succeeding to the estate in Scotland.

May 22, 1826.

2D DIVISION. Lord Mackenzie.

THE late George Ogilvie resided for many years in Jamaica, and acquired in that island a large property called Langley. He was a native of and returned to Scotland in 1785, and soon after married Barbara Dundas. By the marriage-articles he bound and obliged himself, and his representatives, to pay her, in case she survived him, an annuity of £400, 'in lieu and bar of 'dower, which annuity is to be secured and made effectual on 'the said George Ogilvie's estate, plantation, and sugar-work, 'called Langley estate,' &c.; and accordingly he engaged, 'with-'in three calendar months from the time of subscribing the pre-'sent articles, to execute, subscribe, and deliver to George Dun-'das, Esq. of Dundas, brother-german to the said Barbara Dun-'das, or to any person to be named by him, a legal and formal 'deed of settlement with the said Barbara Dundas, or proper

'trustees for the several purposes aforesaid, made out agreeably May 22, 1824.
'to the laws and customs of Jamaica, so as effectually and validly to charge the said George Ogilvy's estate, plantation, and 'sugar-works, lands, slaves, and premises aforesaid in Jamaica, 'called Langley, with the payment of the annuity of £400 sterling, hereby made payable to the said Barbara Dundas, making 'the same a real burden, lien, charge, and encumbrance on said 'estate, plantation, sugar-works, lands, slaves, and premises 'aforesaid.' The deed also provides, that 'in case the said 'George Ogilvie think proper to lay out any part of his fortune 'in the purchasing land in Scotland, he is to take the rights 'and securities thereto in favour of himself and the said Barbara 'Dundas, in joint fee and liferent, in further security to her of 'the payment of the said annuity of £400 sterling, and to his 'heirs or assignees in fee, in full lieu, bar, and satisfaction as 'aforesaid; and when the payment of the said annuity to the 'said Barbara Dundas shall thereby, or by any other ways and 'means, be sufficiently secured to the satisfaction of the persons 'afternamed, at whose instance execution is to go on the present articles, or to the satisfaction of the majority of them then 'in life and in Scotland, then, and in that case, the said Barbara 'Dundas binds and obliges herself to grant and subscribe all 'deeds that shall be advised by counsel versant in the laws and 'customs of Jamaica, necessary for discharging and disburdening the said George Ogilvie's estate in Jamaica, on which the 'said annuity is to be made chargeable as aftermentioned.'

Soon after his marriage, George Ogilvie purchased a small landed property in Scotland at the price of £10,000, the rental of which was not adequate to pay the annuity, being only about £200; and he took the titles of this property, which he called Langley Park, in favour of himself, his heirs, and assignees, instead of, as stipulated, to himself and Barbara Dundas in joint fee and liferent. In 1791, he died without having executed any deed, formally charging this property or that in Jamaica with her annuity. He left no issue, and his nearest relatives were his sister, Mrs Isabella Clerk, and her two children, George Ogilvie Clerk, and Miss Clementina Clerk. Prior to his marriage, Ogilvie had executed a deed of settlement, by which he conveyed his whole property and effects, including his estate in Jamaica, to trustees for behoof of his nephew George, subject to payment of his whole debts; but by a subsequent deed, he excluded him, and substituted in his place Miss Clementina Clerk. Having made no settlement as to his Scotch landed estate, his sister Mrs Clerk succeeded to it as his heir-at-law; and Miss Clementina Clerk, by virtue of the deed of settlement, acquired right to

May 22, 1826. his whole personal effects, and also to the Jamaica estate, out of which the annuity was paid to the widow for several years.

In 1792, Mrs Clerk sold the Scotch estate for £16,000, and the purchaser granted, in part payment of the price, an heritable bond over the property for £4000. The widow, Barbara Dundas, then raised an action against Mrs Clerk, as representing the late Mr Ogilvie, concluding, that, in terms of the marriage-articles, she should be ordained to secure to her an annuity of £400 out of the Scotch estate; or otherwise, should make payment of £10,000, to be laid out in heritable security to answer that annuity, and on this action she arrested in the purchasers' hands, and executed inhibition.

The trustees under George Ogilvie's settlement, about the same time, instituted proceedings before the Court of Chancery in England for exoneration, and to have the rights of persons interested in the deed declared. The Lord Chancellor in substance directed the widow's annuity to be paid out of the Jamaica funds—'but this is to be without prejudice as to any other 'estate being settled to the payment of the said annuities.' From this source the widow's annuity was accordingly paid.

Mrs Clerk died in 1800, and she was succeeded by her son George, as her heir-at-law, who thus acquired right to the heritable bond, while her personal effects, including the balance of the price of the Scotch estate, fell to her daughter Clementina, who had married a Mr Perry, and assumed the name of Mrs Perry Ogilvie.

On the death of her mother, Clementina raised an action against her brother George, claiming re-payment of the annuities paid by her to the widow, and concluding that he should free and relieve her from such payments in future, or at least should invest £5000 as a security for that purpose. The widow then wakened her action (which had fallen asleep), and transferred it against both George as his mother's heir-at-law, and against Clementina as her executrix; and in these actions the question came to be, whether the widow's annuity formed a burden on George the heir, who had taken up the heritage of Mr Ogilvie, or on Clementina his heir in mobilibus, and who had succeeded to the Jamaica estate. By her it was maintained, that, by the general principles of law, the heir-at-law is liable for the heritable debts, and must relieve the heir of provision (which character she contended she possessed) of all debts, whether real or moveable—and that this principle was fortified by the intention expressed by the deceased, who had bound himself to take the titles of the Scotch heritage to his wife in liferent, in security of her annuity. On the other hand, it was pleaded by George,

that the Jamaica estate was, liable primo loco,—that the question as to which of the parties should bear the burden of the debts, was a question of intention, and that it was plain, that in this case it was not intended by Mr Ogilvie that he should relieve the heir of provision. By the widow it was contended, that she was entitled to payment out of both estates—and that the question of relief was one between the other parties, who were both liable to her, and with which she had nothing to do. The Court, on the 29th May 1804, and on the report of the late Lord Meadowbank, pronounced this judgment: 'Find, that the 'annuity of £400 Sterling was an heritable debt, for which the 'estate in Scotland that belonged to the deceased George Ogilvie, 'the pursuer's husband, was liable, and that it still affects the 'reversion or balance of the price of the said estate, and therefore 'find that the defenders, Mrs Clementina Ogilvie, and her husband George Perry Ogilvie, are bound to assign and convey the 'reversion of the said price in as far as it is not exhausted by preferable debts to the pursuer in liferent, in further security of her 'said annuity; but upon receiving such conveyance, find that she 'must discharge the Jamaica estate to the extent of that proportion of the annuity for which she will then be secured in 'the property in Scotland; and find that the heir and executor 'in Scotland are to be relieved by the heir or devisee of the Jamaica estate, in the proportion that the free value of said estate 'bore at the death of George Ogilvie, to the free reversion of 'the Scotch estate; the said annuity of £400 being to be considered as a catholic debt affecting said estates in Jamaica 'and Scotland, but not rendered a real burden thereon; and remit to the Lord Ordinary to apply this interlocutor, and to determine the other points in the cause.' Thereafter, the Court altered this interlocutor, and found, 'that Mrs Clementina 'Ogilvie, the heir of the Jamaica estate, is entitled to a total 'relief of the pursuer Mrs Barbara Dundas's annuity of £400 'from George Clerk Ogilvie, the heir to the estate in Scotland, 'left by the said George Ogilvie deceased, to the extent of the 'reversion of the said estate;' and their Lordships afterwards, on the 27th November 1804, adhered.* In consequence of this judgment, the heritable bond was transferred in relief to the sister Clementina; and thereafter, by virtue of a decree of the Court, and certain other proceedings, Mr Charles Stewart, W.S. acquired right to it. May 22, 1826.

George Clerk Ogilvie died, and was succeeded by his son Simon Taylor Ogilvie, a minor.

* See Morr. No. 1. Ap. Discussion.

May 22, 1826. On attaining majority, Simon Taylor Ogilvie appealed, but in consequence of Mr Stewart, the holder of the bond, not having been made a party, the case was remitted back, with directions to sist him as a party. He had, however, died in the meanwhile; and Simon Ogilvie having petitioned the Court of Session to carry the remit into effect, they sisted the representatives of Mr Stewart as parties, and remitted to Lord Mackenzie, as Ordinary, to proceed in the cause. Ogilvie having then raised an action of reduction of the decree and proceedings transferring the bond of £4000 to Mr Stewart, the Lord Ordinary conjoined the actions, and assoilzied the defenders, with expenses; and the Court, on the 1st March 1823, refused a petition without answers.

Simon Clerk Ogilvie appealed, and called as respondents the representatives of Mr Stewart, and subsequently also the widow Barbara Dundas.

Appellant.—The Jamaica estates were charged with the annuity. Had the testator intended to disburthen them, he would have taken the titles to the Scotch estate to himself in fee, and his wife in liferent—but he did not do so. Both as a matter of intention, and express legal obligation, the Jamaica estate is the proper debtor for the annuity, and thus the application of the ordinary rules of law as to relief between heir and executor is excluded.

Respondents.—(*Stewart's Representatives.*) In the case of heritable succession partly testate and partly intestate, the general rule of law is, that the heir, ab intestato, must relieve the party favoured by the settlement, of all debts chargeable against the testator. Besides, the deceased indicated, by the most express terms, his intention to burden the Scotch estate, and to relieve the Jamaica estate.

Respondent.—(*Barbara Dundas.*) The widow is, by the marriage settlement, a catholic creditor on both the estates in Jamaica and Scotland, for payment of her annuity. This is res judicata as to the Jamaica estate; and as to the Scotch estate, even if there had been no express obligation by the deceased to burden that estate with her annuity, she would have been entitled at common law to have claimed from the heir succeeding. She has nothing to do with the question of relief between the heir and executor. She asks complete and full security, and this she is entitled to claim from both estates. Her demand is

in no ways affected by the circumstance that the Scotch estate was not of such value as, of itself, to meet the annuity. Still, such as it is, she is entitled to hold it in security. May 22, 1826.

The House of Lords found, that, 'by the marriage-articles, 'the annuity of £400, provided for Barbara Dundas, became, 'in equity, an express charge upon the Jamaica estate, accord-'ing to the law of Jamaica; agreeably to which law, the said ar-'ticles are to be construed against all persons claiming interests 'on that estate, under the testamentary dispositions, or other 'acts taking effect after the date of the said articles; and that 'according to the true intent of the said articles, the said annui-'ty was to be considered as primarily charged upon the Jamaica 'estate, until the same was sufficiently wholly secured, as is 'mentioned in the articles, to the satisfaction of the persons 'named in the articles, upon land purchased in Scotland, when, 'after the same was so wholly secured, the estate of Jamaica 'was to be wholly discharged and disburthened thereof; and 'regard being had to all the circumstances of this case, which 'took place after the execution of the articles, the Lords find 'that the Jamaica estate is to be considered as remaining pri-'marily liable to pay the whole of the annuity of £400 a-year, 'if the same can be wholly paid thereout; and that, in such 'case, the persons entitled to the Jamaica estate are not entitled 'to any relief or contribution from the estate in Scotland, or 'the reversion or balance of the price of that estate; and in such 'case also, the said Barbara Dundas is not entitled to payment, 'or part payment, of the said annuity, from the estates in Scot-'land, or the reversion or balance of the price of that estate; 'and it is ordered and adjudged, that the several interlocutors 'complained of in the said appeal, so far as they are inconsist-'ent with this declaration and finding, be, and the same are 'hereby, reversed: And it is farther ordered, That, with this 'declaration and finding, the cause be remitted back to the 'Court of Session in Scotland, to do therein, as is just and con-'sistent herewith.'

Lord Chancellor.—My Lords, there is a case which has been argued at your Bar, in which Simon Taylor Ogilvie, Esq. son and heir of George Clerk Ogilvie, Esq. is the appellant, and Mrs Margaret Lindsay or Stewart, relict of the late Charles Stewart, Esq. W. S., and several others, who are his surviving trustees, are the respondents. (His Lordship then detailed the proceedings in the Court of Session.)

The question arising in this case is this, namely, Whether the Court of Session in Scotland is right in considering this case as a question between two estates to be judged of merely by the law of Scotland? My Lords, under the circumstances which I have to state, I apprehend this

May 22, 1826. case must be judged of as a case, in which the provision was made, not under the law of Scotland, but under the law of Jamaica. It appears that Mr Ogilvie had resided many years in that Island; that he had acquired a very large fortune, and particularly a sugar plantation called Langley. He returned to this country after having been in Jamaica for a considerable time. He made his will, of which I do not think it necessary to state farther than to say, that he directed that out of his real and personal estate, all his debts and legacies should be paid; and then he declared further, that the plantation in Jamaica, with the whole stock and effects therein, should be held in trust, and one moiety of the annual rents should be paid to his nephew, the late George Clerk, for his natural life; and the other moiety held in trust for the second, third, fourth, fifth, and sixth sons of his sister, Mrs Isabella Clerk. After he had made this will, he married, and executed marriage-articles, the effect of which, judged of by the law of Jamaica, I apprehend, would be exactly the same as if it had been a marriage settlement in England, directing an annuity on the Jamaica estate. By those marriage-articles, he bound and obliged himself, his heirs, executors, and successors, to pay to his promised spouse, in case she should survive him, an annuity of £400 sterling, in lieu of her dower, which annuity is to be secured and made effectual on the estate, plantation, and sugar-work, called Langley estate, in Jamaica.

My Lords, I have much better authority than my own for saying, that a Court of Equity in England would consider these marriage-articles to amount to a direct specific charge upon that Jamaica estate of this £400 a-year, because there was a suit instituted in the Court of Chancery, which came on to be heard before my predecessor; and in that suit he expressly declared this £400 to be a charge upon the estate in Jamaica; nevertheless, qualifying that decree by saying, it was to be without prejudice as to any other estate being settled to the payment of the said annuities, if any claim could be maintained and made good, but expressly stating, that which I feel to be perfectly clear, that nobody, under the will of this gentleman, or under any instrument, could have taken this Jamaica estate, other than subject to the payment of that £400 a-year. The question, however, arose in this way:—This gentleman, by his marriage-articles, bound and obliged himself to execute within three calendar months, a legal deed of settlement in favour of Barbara Dundas, or proper trustees, made out agreeably to the laws and customs of Jamaica, so as effectually and validly to charge the Langley estate with the payment of the annuity, and making the same a real burden, lien, charge, and encumbrance, upon this estate (so that, in the express terms of this covenant, it was to be clearly a charge and encumbrance on this estate); and then follows a clause, with reference to which, it appears to me that the Court of Session in Scotland have considered this as a case in which they were at liberty, as they thought upon their first interlocutor, to make the Jamaica estate, and another estate marked in the passage I am about to read, contribute in proportion to this annuity of £400 a-year; and by their other interlocutor, they have thrown the whole upon the estate in Scotland. The words occur in the settlement respecting the Ja-

maica estate, and must be construed according to the law of Jamaica. The words respecting the estate in Scotland are these: 'And in case the said 'George Ogilvie thinks proper to lay out any part of his fortune in the 'purchasing land in Scotland, he is to take the rights and securities there- 'to in favour of himself and the said Barbara Dundas, in joint fee and 'life-rent, in farther security to her of the payment of the said annuity of '£400 sterling, and to his heirs and assignees, in fee, in full lieu, bar, 'and satisfaction, as aforesaid.' If the clause had stopped here, it is plain that the intention would have been of this nature,—that if he thought proper to lay out part of his property in Scotland, he was to take the right to that estate, in such a way that it should be a further security for the £400 a-year. Then, being only in further security of the payment of £400 a-year, it could never be considered as discharging that which had been made the primary security, but only as providing a further security. May 22, 1826.

But it did not rest there: and I presume it is upon these words that the decision of the Court of Scotland has been rested as between these two estates, without recollecting that the one was a Jamaica estate, (perhaps not in the way in which it appeared to the Court,) and the other was a Scotch estate; for the clause continues, 'and when the pay- 'ment of the said annuity to the said Barbara Dundas shall thereby, or 'by any other ways or means, be sufficiently secured to the satisfaction 'of the persons after-named, &c., and any other person that may be 'appointed by the said Barbara Ogilvie for that purpose, at whose in- 'stance execution is to go on the present articles, or to the satisfaction 'of the majority of them in life and in Scotland; then, and in that case, 'the said Barbara Dundas binds and obliges herself to grant and subscribe 'all deeds that shall be advised by counsel versant in the laws and cus- 'toms of Jamaica necessary for discharging and disburdening the said 'George Ogilvie's estate in Jamaica, on which the said annuity is to be 'made chargeable as after-mentioned.' So that it is clear the Scotch estate was to be only a farther security; and if your Lordships are to look at the subsequent part of the clause, it is extremely clear, that the Jamaica estate was not to be disburdened, unless that case arose in which the payment of the annuity was sufficiently secured to the satisfaction of all these persons, or a majority of them. Then Mrs Ogilvie was compellable, under this last clause, to have subscribed deeds entirely discharging and disburdening Mr Ogilvie's estate in Jamaica. The consequences of which would be, that that estate being so entirely discharged and disburdened, would not be encumbered with the annuity, but the annuity would be wholly upon the Scotch estate that was so settled to the satisfaction of those trustees.

My Lords, it appears that Mr Ogilvie afterwards purchased an estate, by no means at the time equal to the payment of £400 a-year; that he lived a considerable time afterwards, but that no arrangement took place at all about the settling of this property. After his death, the annuity was paid out of the Jamaica estate for a very considerable time; and it cannot be contended, that anything took place which can be represented as altering the arrangement made by him in his lifetime, under which the

May 22, 1826. Scotch estate was to be only in further security of the payment of the annuity, unless a settlement were made sufficiently securing the whole of the annuity to the satisfaction of the persons who on her behalf were to be satisfied, and who, upon receiving that satisfaction on her behalf, were to call on her to subscribe all deeds that should be advised by counsel versant in the laws and customs of Jamaica necessary for discharging and disburdening Mr Ogilvie's estate in Jamaica. It does not appear that there are any circumstances indicative of any such settlement having been made; and in looking at the value of this property that was purchased in Scotland, from time to time, and the utter want of all attempt even to shift the whole of the £400, or part of it, to this Scotch estate, it does not appear to me, that there was any intention, either on the part of Mr Ogilvie, or on the part of Mrs Ogilvie, to change the liability. It was a mere question between one property of Mr Ogilvie and another property of Mr Ogilvie. The lady received her £400 a-year out of the Jamaica estate for several years after his death; her right to do so was declared under the Court of Chancery in this country; and there is nothing to prove to us, that the change was contemplated. She was content with it as it was; and the object of Mr Ogilvie being to shift the whole from one estate to another, and not merely to charge a part of the annuity on the Scotch estate, when the Scotch estate could not pay the whole, but to shift it entirely from the one to the other,—she having a sufficiency from the Jamaica estate, and never calling for the settlement of the Scotch estate in his lifetime, or expressing any other than satisfaction to take the security of the Jamaica estate,—it does appear to me, that the party left this at his death a charge upon the Jamaica estate; that the charge upon the Scotch estate was not intended in his lifetime, nor called for by her for a very considerable period after his death; nay, so far from it, the Scotch estate was sold; and it was upon the conversion of it into money that this question, as between the two different estates, has been raised. Under these circumstances, my opinion, my Lords, is, that the Jamaica estate is the estate wholly responsible for this £400 a-year. If your Lordships think proper to adopt that opinion, the consequences must be, that this judgment must be reversed. At the same time, I think it but right to say, that if the case could be put upon the principles which the Court of Session of Scotland have applied to it, I do not mean to say, that the judgment would be wrong; and with a view, therefore, to shew the grounds on which I humbly propose these interlocutors should be reversed, I have endeavoured to frame a judgment expressed in special terms, which judgment, if your Lordships please to adopt, I should take the liberty of proposing in the course of to-morrow.

LORD CHANCELLOR.—My Lords, your Lordships were pleased, upon my application, to adopt the suggestion of resuming the farther consideration to-day of the case of Simon Taylor Ogilvie, and Mrs Lindsay, relict of Mr Stewart, and his representatives; and I beg to state to your Lordships, that, in consequence of seeing the agents in this business, I am very much afraid that it will be impossible for your Lordships to come

to a final judgment upon the case, without hearing one counsel upon May 22, 1826.
each side on the part of Mrs Ogilvie, who claims an interest in this subject; because, in no way in which I can look at this case, will it be possible for your Lordships to adopt a judgment of such a nature as was proposed by the individual now addressing your Lordships, in the House last year. If such a judgment as that should be adopted by the House, it appears to me, upon reading certain articles of marriage, that it would cut off that lady altogether, if that should be the proper construction of the articles to which I alluded. I stated the other day to some of your Lordships then present, that I thought the judgment had been given in the course of last session of Parliament; but being put in mind of what passed, the amount of it proved to be no more than this, that a proposed judgment had been intimated to the parties, and they had desired that the interest of Mrs Ogilvie should be saved; and there the matter rested; and also not merely on account of Mrs Ogilvie's claim, but by reason that I find in my papers notes in the hand-writing of a noble and learned Lord (Lord Redesdale), who will not be in town till the latter end of this week; and it must have been a matter of difficulty to have given a final judgment in this case in the absence of that learned and noble Lord. However, upon considering what has been further stated to me, as to Mrs Ogilvie's interest, and as it would be found a matter of extreme difficulty to save that interest, the proper mode would be that her interest should be discussed by one counsel on a side, before your Lordships pronounce a final judgment upon the matter,—taking care that those counsel should be heard as early as a due attention to her interests, and the convenience of the House, will allow. At the same time, it may be right to open once more the nature of this case, with a view that this House may understand the point to which it may be necessary that those counsel, when heard, should address themselves. And I feel myself rather the more anxious to go into it on account of certain papers, in another cause, that have been laid upon your Lordships' table.

My Lords, your Lordships will find, from what is stated in the Cases, that the late Mr Ogilvie of Langley Park, in the county of Forfar, had for many years resided in Jamaica, where he acquired a valuable property, and carrying those feelings with him which men naturally enough carry with them from the place of their nativity, and to which they intend to return, he called that place also by the name of Langley. In 1785, he returned from Jamaica, and married Mrs Barbara Dundas; and, by his marriage-articles, he obliged himself and his representatives to pay to Barbara Dundas, in case she should survive him, an annuity of £400 sterling, in lieu and bar of dower. This, your Lordships observe, was a charge upon the estate in Jamaica; the effect of which charge being to be considered according to the laws of Jamaica, as administered in the law and equity courts; and it is to be in lieu and bar of what is called dower. This was to be secured upon his plantation and sugar-work, called Langley estate, in Saint Mary's parish, county of Middlesex, and island of Jamaica; and he expressly bound himself to charge his said

May 22, 1838. estate, and all its appurtenances, with the payment of that annuity of £400 Sterling.

My Lords, as far as I have now stated the contents of these articles, they would appear to justify me in stating, that, by virtue of these articles, that estate was specifically bound to supply that annuity, in lieu and bar of dower; and if the laws of Jamaica in respect to real estates are, with some small difference, the same as the laws of England, your Lordships would have to consider this estate in Jamaica bound in the same manner, with respect to the payment of the annuity, as an estate would be bound by similar articles, if, instead of being situated in Jamaica, it were situated in Yorkshire.

My Lords, there was then a particular clause in those articles, which is, in truth, the clause upon which the question arises, namely, 'that in 'case the said George Ogilvie should think proper to lay out any part of 'his fortune in purchasing land in Scotland,' &c. (Here his Lordship quoted the passage.) There is no doubt, therefore, I apprehend, that by virtue of these articles and the annuity clause, stated in the articles of agreement, that the Jamaica estate was bound in equity; and it was to have been in a very short time bound in law, to the payment of this annuity; but Mrs. Ogilvie being a Scotch lady, probably those who acted for her naturally enough thought that it would be a much more convenient thing to her to have an annuity upon the Scottish estate; and one question in the cause turns upon the meaning of the article I have read to your Lordships. There are two questions proposed; first, What is the effect of the law of Scotland as between these two estates, the one of which goes to the heir of line, and the other to the heir of provision? How is the law of Scotland, as to this property, independent of the effect of this clause of obligation in the articles of agreement? The other question is, What is the effect of this clause in the articles of agreement? I shall just repeat the words again:—'That in case the said George Ogil-'vie should think proper to lay out any part of his fortune in the purcha-'sing land in Scotland, he is to take the rights and securities thereto in 'favour of himself and the said Barbara Dundas, in joint fee and liferent, 'in further security to her of the payment of the said annuity of £400 'Sterling, and to his heirs or assignees in fee, in full lieu, bar, and sa-'tisfaction, as aforesaid.' It seems extremely difficult to say, if the land in Scotland were not worth more than two hundred pounds a-year, that it was to be taken 'in full lieu, bar, and satisfaction of dower;' and 'when the payment of the annuity shall thereby, or by any other ways 'and means, be sufficiently secured, to the satisfaction of the persons 'after named, at whose instance execution is to go on the present arti-'cles, or to the satisfaction of the majority of them in life and in Scot-'land, then, and in that case, the said Barbara Dundas binds and obliges 'herself to grant and subscribe all deeds that shall be advised by counsel 'versant in the laws and customs of Jamaica, necessary for discharging 'and disburdening the said George Ogilvie's estate in Jamaica, on which 'the said annuity is to be made chargeable, as after mentioned.' This

obligation, and this charge upon Langley, that is, the Scotch estate, was never to take place, till the trustees were satisfied, and the Jamaica estate should be exonerated; and it can never be supposed, that it was the intention of these parties that the Jamaica estate should be discharged, until the £400 a-year was secured upon the Scotch estate. May 22, 1826.

Another question is, whether, if the Scotch estate did not produce £400 a-year, but would produce £200, whether it was the intention of these articles, that, in that case, the Jamaica estate should pay £200, and the Scotch estate £200 a-year, or whether the whole charge should remain upon the Jamaica estate until the Scotch estate could pay the whole?

Mr Ogilvie purchased an estate in Scotland, for which he gave £10,000. He built a house upon it, and borrowed a good deal of money to pay for it. He died. The effect of the decisions in the Court of Session, in consequence of suits instituted there some period after his death, was, that those estates were to be contributary; and it is contended by the appellant, that no act having been done by the trustees, nor by this lady, before these suits were instituted, the Jamaica estate is the estate at this moment liable to the whole of this annuity; and that there is no recourse to be had to contribution, between the two estates, because the Scotch estate was thought so little liable, by way of contribution, as to have been sold; and the judgment now, upon the notion of contribution, affects the price, and not the estate itself.

My Lords, your Lordships perceive that this is a question, supposing this Scotch estate to have been sold, to be decided, first, Upon what is the law of Scotland, supposing there to be no articles of agreement? Secondly, How is it to be decided, regard being had to those articles of agreement? And with reference to both those questions, your Lordships will be pleased to permit me to point out to you, that this is not the case of two Scotch estates, but it is the case of an estate in Jamaica, (which, I presume to hope, I may be allowed to state, is a circumstance that obliges us to look to the laws of England, so far as the laws of England are the laws of Jamaica, in respect of real property,) and an estate in Scotland; and admitting all the views of the law of Scotland, if they had been two estates in Scotland, I think it will be found very difficult to apply the Scotch law to Jamaica property, under the circumstances I have stated.

My Lords, I have taken the liberty to say, that I may allude to the laws of England; and I confess I feel it right to take the liberty of so stating the matter, because, in turning over some papers upon your Lordships' table, in the case of Gordon against Robertson, I find laid upon your Lordships' table, a report of a judgment in the case of the Duke of Roxburghe against John Roberton, stated to have been pronounced by the individual who has now the honour of addressing your Lordships, where the question was, Whether the tenant was obliged to use all the hay and straw upon the premises?—And I am reported to have observed, 'It has been said, 'that the custom of the country is, as it was represented to your Lord-'ships at the Bar. I believe it to be so; but whether it be so or not, I 'will take it to be so; but I apprehend, if we are to administer Scotch law

May 22, 1832. 'on English principles, when persons enter into a tack, their engagements, 'as far as engagements provide for certain things therein expressed, shut 'out the custom of the country.' But I must beg leave to say, that although this note was taken by a gentleman remarkable for his accuracy, I mean Mr Gurney, I am perfectly sure there is a mistake here; for, from the first moment in which I have had the honour of addressing the House as Speaker of the House in matters of Scotch law, I have felt it to be a very difficult duty to discharge, but a duty I was bound to struggle to discharge, never to decide a Scotch case by taking what was the law in England upon the subject. I think I speak in the presence of those who can bear me out in that statement; but if I were to say, that my mind, affected as it must be by belonging to a person who has been connected with the English law fifty years, can escape an influence, no man, I admit, would give me credit. But feeling this most strongly, I have upon every occasion, since I have had the honour of addressing this House, made it my first duty to recollect, that I was not to decide a Scotch cause according to English law. I will not say that I may not have done so, but it has been done without being conscious that such was the case, and after I had struggled extremely to take care I should not do so. And I believe what I have referred to, to be a mistake, for more reasons than one; because, if you will look back to the sentence that precedes what I am now observing upon, you will see an intimation of my conviction, that the case ought to be decided, not according to the English law, but the Scotch law; and you will find, that I am making this distinction between the English law and Scotch law, that if an English tenant be bound to leave upon the farm all those articles, hay and straw, and so forth, that whether there is any provision that he shall have a right of entry or not, he shall have a right to enter and enjoy to that extent. The English law says this, If you, the landlord, reserve these things for yourself, it is implied in that reservation that the tenant has a right, though it is not expressed, to come upon the premises and enjoy those things. But I expressly go on to state, 'We have here to construe a written contract, and if the Scotch 'laws are to be administered on the same principles of English law, or 'any law founded upon principle, we must hold that the engagement of 'parties to each other by the express stipulation of a written instrument, 'exclude all consideration of the custom of the country.' This has been very much commented upon, and very freely commented upon, in the papers we are now furnished with. And I am farther confirmed in my notion that this is an error, as there is another report of this case by Mr Bligh;* and I am informed by Lord Gifford, who has looked into that report, that there is no such passage in it.

My Lords, I find that Lord Hermand remarks,—and I take the liberty to mention him, because I can never look at an observation of his in the Court of Session, without recollecting periods that are now long gone by, in which we fought most manfully together, very frequently in the old

* Bligh's Reports, vol. II. p. 267.

House of Lords, but we have never been together in this apartment, in which I have now the honour to address your Lordships;—and extremely happy should I be to have an opportunity of giving him an answer to the question he puts from the Bench upon my statement—'Suppose (says 'he) a landlord had inserted in the articles the condition that the tenant 'should hang himself the last year of the lease, I should like very much to 'know what the Lord Chancellor would say to that.' I do not know, my Lords, whether what I am stating will or will not be conveyed to my excellent friend; but if anybody do intimate to him what I am now stating, I wish he would add, that at Lord Hermand's time of life and my time of life, he may be assured that I entertain as high a regard for him as I did when we met so often here in our earlier days; and if I could only have the honour of meeting him anywhere except in a court of justice, and he would ask me, 'Supposing a landlord had inserted in his 'articles the condition that the tenant should hang himself the last year 'of his lease, I should like to know what the Lord Chancellor would 'say to it;' I would undoubtedly, as Lord Chancellor, give him an answer to the question. But in a court of justice I must decline doing so. His Lordship then proceeds:—'I see that reference is made to 'English authorities. An Englishman can know nothing of the matter. 'But there is no tenant or landlord in Scotland, who does not under-'stand what has been the law of two centuries, that a stipulation in a 'lease for consuming the fodder has nothing to do with the last year of 'the lease.'* To a certain extent I go along with my learned friend; but I ought to put him in mind (and I certainly should put him in mind, if I had the happiness of seeing him), that when we met to argue matters as counsel on the same side of the Bar, with all the zeal that influences young men, and which generally generates conviction that they are right, although, if they live longer, they find that they are wrong, I cannot say, that at that period my learned coadjutor was so constantly sure that the Court of Session was right, as of late years he seems to think. But, my Lords, I now say, what I am sure I have said over and over again in this House, that I think, in a Scotch cause, reference can be only made to English authorities, for the purpose of seeing what the reason and wisdom of such authorities are in such a case; and, on the contrary, I have always had a most conscientious conviction, not only that I would not be discharging my duty in advising your Lordships, but betraying my duty, if I called upon you to determine a Scotch case by English law. But I do not pretend to say, that my mind may not have been influenced in a degree, in which it would not have been influenced, if I had been bred a Scotch lawyer instead of being bred an English lawyer. This principle I think it right to state, and whenever my conduct shall come to be discussed, now or hereafter, I must stand or fall in the opinion of those trying it, by the fact, whether I have or have not, know-

May 22, 1826.

* This speech was delivered in the case of Gordon against Anderson, which was not then under appeal, but depended on that against Robertson, &c.

May 22, 1826. ingly, or with the least suspicion that I was so doing, ever decided a Scotch case upon English principles, without looking at the question, whether it could be properly so decided; and without avowing that it never could be properly so decided, unless the law of England and Scotland were the same upon that point.

My Lords, the question now to be decided in the present case, is this, namely, recollecting that the Jamaica estate is not a Scotch estate, and recollecting the effect of these articles of agreement upon the Jamaica estate, not the Scotch estate, and looking at the real meaning of the clause by which the annuity was to be shifted from the one estate to the other estate, whether the decision of the Court of Session was right or not? My Lords, I have stated to your Lordships, that I had communicated what had occurred to me upon this subject in the course of the last Session, to the agents at the Bar; and it is intimated to me this morning, that there might be no objection to that judgment, if the interest of Mrs Ogilvie could be reserved for future consideration; but that appeared to me to be impossible, because if your Lordships, in one way of deciding it, should be of opinion that the judgment of the Court of Session is right, there would be no occasion to reserve the consideration of her interest. On the other hand, if your Lordships should be of opinion that the judgment is wrong, you cannot decide that the judgment of the Court of Session is wrong, without deciding it upon a ground which may materially affect the rights of Mrs Ogilvie. Therefore, it would be the safest and the better way of proceeding; first, as to the uniformity of proceeding, and secondly, with respect to that which you will look at with great attention, namely, the interests of those supposed to be interested, to direct that Mrs Ogilvie should be heard for her interest, by one counsel at the Bar, on any day, as soon as the parties can communicate to your Lordships that they are ready to have that interest so provided for, by arguing at the Bar. I should suggest, therefore, that the farther consideration of this case should be adjourned to this day se'ennight, and upon this day se'ennight the agents can inform the House upon what day they will be ready to argue the case on the part of Mrs Ogilvie. These are the circumstances of the case. I would, therefore, in the terms I have stated to your Lordships, move that the farther consideration of this case be adjourned to Monday next.

Lord Chancellor.—My Lords, there is a case that was heard in the last Session of Parliament, the case of Ogilvie *v.* Dundas. A judgment had been prepared in that case, but it appeared that a lady of the name of Mrs Barbara Dundas had not appeared; and it appearing from the nature of that judgment, that she had an interest in the case, your Lordships were pleased, in the course of the present Session of Parliament, to hear her by her counsel; and it is now my intention to move your Lordships to dispose of the cause by the best judgment I can suggest upon the case as fit to be pronounced by your Lordships. My Lords, after having attentively considered, not only in the last year, but the present year also, what is to be the construction of the instrument, under

which this lady would take an annuity out of the Jamaica estate; and also, in certain circumstances, have a claim upon the Scotch estate which was purchased, or the reversion or price of that estate, I still continue of opinion, that these articles of agreement, relating to the Jamaica estate, must be construed according to the laws of Jamaica; and that, whatever may be the law of Scotland in a case where there is a claim between two Scotch estates, the right of this lady must be determined as the rights of persons respectively entitled to Jamaica estates and Scotch estates must be determined, by the true intent and meaning of those articles in Jamaica. The consequence of which is, that I should propose to your Lordships the following judgment, desiring that, if your Lordships adopt this judgment, it may be drawn out in proper form, with reference to the different circumstances laid before the House, and with reference to the fact, that Mrs Barbara Dundas has been heard. I would propose to your Lordships, that the judgment to be adopted should be this: That it be declared by the Lords Spiritual and Temporal in Parliament assembled, (and, after stating that this lady had been heard by her counsel,) that by the marriage articles, the annuity of so much a-year provided for Barbara Dundas became an equitable and express charge upon the Jamaica estate, according to the law of Jamaica; agreeably to which law, the said articles are to be considered against all persons claiming interests in that estate, under testamentary dispositions, or other acts, taking effect after the date of the said articles; and that, according to the true intent of the said articles, the said annuity is to be considered primarily charged upon the Jamaica estate, until the same was wholly secured, as is mentioned in the articles, to the satisfaction of the persons named in the articles, upon lands purchased in Scotland; when, after the same was so wholly secured, the estate in Jamaica was to be wholly discharged and disburdened thereof; and, regard being had to all the circumstances of this case, which took place after the execution of the articles, to find that the Jamaica estate was to be considered as remaining primarily liable to pay the whole of the annuity, if the same can be wholly paid thereout; that in such case the persons entitled to the Jamaica estate are not entitled to relief from the estate in Scotland, or to the price or reversion of it; and that, in such case also, the said Barbara Dundas is not entitled to payment, or part payment, from the estate in Scotland, or the reversion or price of the said estate; and to order and adjudge that the several interlocutors complained of, be, as they are hereby, so far as they are inconsistent with this declaration, reversed; and to order further, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, that they may do therein as is just and right. I would propose to your Lordships that this form of judgment should be delivered to the agents on both sides, with a view that they may see that it is properly drawn up, before your Lordships' judgment is rendered final, in point of form. I cannot close what I have to say, without declaring that I am perfectly convinced that this is the true intent and meaning of these articles, and that is the correct judgment. Perhaps it is to be lamented, on the part of Mrs Barbara

May 22, 1826.

May 22, 1826. Dundas, that more care was not taken on her behalf, in the first instance; but that is a matter we cannot supply here in this stage of the cause.

Respondents' Authorities—Russel, Jan. 23, 1745 (5211). Campbell, Jan. 4, 1747 (5213). 3 Ersk. 2, 50, 52.

T. DUTHIE—J. RICHARDSON—*Solicitors.*

No 21. MAGISTRATES of GLASGOW and TACKSMAN, Appellants.—*Adam—Keay.*

DAWSONS and MITCHELL, Respondents.—*Robertson—Campbell.*

Burgh Royal—Feu—Thirlage.—The Court of Session having found that certain lands, situated within the territory of the royal burgh of Glasgow, and which had been disponed by the Magistrates in feu-farm for payment of a feu-duty, but to be held burgage, and the titles having been made up as if held in feu, were to be considered as holding feu; and that grain imported within their bounds was not liable to certain burgh taxes, called ladle-dues; and that a clause of thirlage did not apply to invecta et illata;—the House of Lords remitted the case for the opinion of all the Judges.

1ST DIVISION. May 22, 1826. Lord Alloway.

THREE questions were involved in this case: 1st, Whether certain lands belonging to Dawson, one of the respondents, were held feu or burgage? 2d, Whether certain dues were exigible by the Magistrates of Glasgow, for grain brought on to these lands? And, 3d, Whether the lands were subject to a thirlage, not only of grana crescentia, but also of invecta et illata? They arose out of these circumstances.

In the immediate vicinity, and on the north side of the burgh of Glasgow, is situated a piece of land or muir called the Easter and Wester Common, which it was alleged had always been regarded as part of the ancient common good, although of this there was no record in existence.

In 1730, the Magistrates sold part of this common or muir to James Rae; and in 1747, they exposed to sale, by public roup, 'the muir of these parts of the lands of Wester Common, belonging to the town of Glasgow, and within the territory of the burgh, not yet sold off.' They also bound themselves to 'grant to the purchaser a disposition of the said lands, to be holden in free burgage for service of burgh used and wont, and for payment to the said Magistrates and Council, and their successors in office, or their treasurers, factors, and chamberlains, in their name, for the use and behoof of the community of the said

'burgh, of the sum of L.20 Scots money, at two terms in the 'year, Whitsunday and Martinmas, by equal portions,' &c., 'the purchaser's heirs, and their heirs, paying the double of 'the said feu-duty the first year of their entry to the said lands, 'and upon their being infeft therein; and their singular suc- 'cessors, legal or conventional, paying the triple of the said 'feu-duty at their entry, and upon their being infeft therein; 'in both which cases, the feu-duty payable for the year of their 'entry is to be included; and it is declared, that the above pro- 'visions and burdens shall be expressly inserted and engrossed 'in the rights to be granted to the purchaser, and infeftment to 'follow thereon, and in all subsequent infeftments in the said 'lands, and every infeftment given otherwise, and not contain- 'ing the above burden and provisions, shall be void and null 'ipso facto; and with and under the above burdens, provisions, 'and conditions, the disposition so to be granted by the Magis- 'trates and Council to the purchaser, with absolute warrandice, 'except as to the cess, teynd, and other public burdens, which 'the lands are to be burdened with, according as the other 'burgh-lands are affected with and burdened.' These lands were sold to John Young for L.150, who received a deed in form of a feu-contract between him and the Magistrates, whereby, in execution of the articles of roup, the Magistrates 'give, grant, 'sell, annailzie, and, in feu-farm and heritage, perpetually let 'and demit to and in favour of the said John Young, his heirs 'and assignees whomsoever, all and haill the muir of Wester 'Common, lying within the territory of the said burgh, and 'which muir above feued extends to twenty-one acres, &c. In 'the which lands, with and under the reservations above writ- 'ten, the said Magistrates and Council bind and oblige them- 'selves, and their successors in office, to infeft and seise the said 'John Young and his foresaids, upon his own proper charge and 'expense in due and competent form, to be holden in free bur- 'gage, for services of burgh used and wont, and for payment to the 'Magistrates and Town Council, and their successors in office, 'or their treasurers, factors, or chamberlains, in their name, for 'the use and behoof of the said burgh of Glasgow, of the sum 'of £20 Scots money yearly of feu-duty, at two terms in the 'year, Whitsunday and Martinmas next, for the half-year pre- 'ceding, and so forth, to continue in the good and thankful 'payment of the said yearly feu-duty thereafter, at the terms 'above written, &c., and the heirs of the said John Young, and 'his foresaids, paying the double of the said feu-duty the first

May 22, 1626.

May 22, 1826. 'year of their entry to the said lands, upon their being infeft 'therein; and the singular successors, legal and conventional, 'paying the treble of the said feu-duty at their entry, and upon 'their being infeft therein; declaring hereby, that the above 'provisions and burdens shall be expressly insert and engrossed 'in the infeftments to follow hereupon, and in all the subsequent 'infeftments in the said lands, otherwise any such infeftments 'given otherwise shall be, and are declared to be, void and null 'ipso facto. Which feu-tack, and right of the lands above 'written, and infeftments to follow thereupon, and ground-'right and property thereof, with the burden of the provisions 'and reservations foresaid, the said Magistrates and Town Coun-'cil bind themselves and their successors in office to warrant, 'acquit, and defend, to the said John Young and his foresaids, 'and the same to be safe, sure, and free from all and sundry 'perils, dangers, burdens, and encumbrances whatsoever, at all 'hands, and against all deadly, except the feu-duty above writ-'ten, and burdens above specified; and also the cess and teind 'payable furth thereof, and other public burdens, according as 'the other burgh lands are affected with and burdened, &c.:— 'And to the effect, the said John Young and his foresaids may 'be infeft and seised in the said lands, to be holden in free bur-'gage for service of burgh used and wont, for payment to the said 'Magistrates and Council, and their successors in office, or their 'treasurers, factors, or chamberlains, in their name, for the use 'and behalf of the community of the said burgh, of the above sum 'of L.20 Scots money, of yearly feu-duty, at the terms above 'written, &c., with a fifth part of the said yearly feu-duty, of 'liquidate penalty and expenses, in case of failzie, &c., and the 'heirs of the said John Young and his foresaids, paying double of 'the said feu-duty the first year of their entry to the said lands 'upon their being infeft therein, and the singular successors, le-'gal and conventional, paying the treble of the said feu-duty at 'their entry, and upon their being infeft therein; in both which 'entries, the feu-duties payable for the year of their entry to be 'included; and which provisions and burdens are to be contain-'ed in the infeftment to follow hereon, and in all subsequent 'infeftments; and with and under these burdens, the said Ma-'gistrates and Council hereby require , one of 'the bailies of the said burgh, or any other of the bailies thereof, 'for the time being, to pass to the ground of the said lands, and 'there give and deliver heritable state and sasine, as also real, 'actual, and corporeal possession of all and haill, &c., to the said 'John Young and his foresaids, or to his certain attorney in

'their names, bearer hereof, by deliverance of earth and stone May 22, 1826.
'of the ground of the said lands, as use is.'

The deed contained no procuratory of resignation, but sasine was taken on the precept in favour of John Young, the instrument of which stated, that the 'said John Young had pro-'duced to the said bailie a feu-contract, passed and perfect-'ed between the Provost of the said burgh and John Young;' and after quoting the contract, it proceeds, 'after open and pub-'lic reading of the said feu-contract and precept of sasine above 'insert, therein contained, in presence of the said bailie, and 'witnesses subscribing, the above-named Thomas Scott, bailie, 'aforesaid, by virtue and power of his said office of bailary, and 'in obedience to the said precept of sasine, gave and delivered 'heritable infeftment, state, and sasine, also real, actual, and 'corporal possession, of all and haill the foresaid muir of Wester 'Common, &c.; and that by delivering to him of earth and 'stone of the said lands, as use is; and did duly infeft and seise 'him therein, with and under the burden of the feu-duties, and 'other prestations above mentioned, after the form and tenor 'of the foresaid feu-contract and precept of sasine above insert.' —The sasine was recorded in the burgh register.

The part of the Common which, in 1730, had been sold to Rae, had also been conveyed to him to be holden in free burgage, for service of burgh, used and wont, and for payment of 100 merks Scots, which, in the right granted to him, was likewise called a feu-duty. In other respects, the deed of conveyance to him was in the same terms as the conveyance to Young. Rae was infeft, and recorded his sasine in the burgh register. He afterwards disponed the lands to James Miller, who took infeftment on the procuratory of resignation contained in his disposition, and recorded the sasine in the burgh register. In the same way, the lands passed to Robert Hamilton, who also was infeft, on the procuratory of resignation in his disposition, and his sasine was in like manner recorded in the burgh register. Hamilton disponed them to John Young, describing them as lying within the territory of the burgh, and binding 'himself, his 'heirs and successors, duly and validly, to infeft and seise the 'said John Young and his foresaids upon their own charge 'and expenses; and that by resignation thereof in the hands 'of the Provost, or any of the bailies of the burgh of Glas-'gow, for service of burgh used and wont, and for payment 'to the Magistrates and Town Council of Glasgow, and their 'successors in office, for the lands before disponed, of the du-'ties and others underwritten,' and then followed a procura-

May 22, 1826. tory for resigning 'in favour and for' new heritable infeft-
'ment, state, and sasine, to be given and granted to the said
'John Young and his foresaids in due form, to be holden in free
'burgage for service of burgh used and wont, and for payment
'to the Magistrates and Town Council of Glasgow, and their
'successors in office, &c., of the sum of 15 merks, Scots money,
'as being three twentieth parts of the foresaid sum of 100 merks,
'Scots money, of feu duty, payable yearly, furth of the whole
'lands of Wester Common.' In virtue of this procuratory of resignation, Young was infeft, and the sasine was recorded in the burgh register. Being thus in right of the lands so acquired from Hamilton, and also from the Magistrates in 1747, Young disponed them to William Fleming, describing the lands as 'all
'and haill the muir of Wester Common, lying within the terri-
'tory of the burgh of Glasgow.' The obligation to infeft was in the same terms as in the disposition by Hamilton to Young, and in the procuratory of resignation, authority was given to 'resign
'the lands in the hands of the Provost, or of any of the bailies
'for the time being, in favour, and for new infeftment, to be
'granted to the said William Fleming and his foresaids.' The instrument of sasine set forth, that 'in presence of me, and an
'honourable man, John Brown, one of the bailies of the burgh
'of Glasgow, and Robert Hannah, one of the officers of the
'burgh of Glasgow, as procurator specially constituted by John
'Young of Youngsfield,' 'Robert Hannah did resign, surrender,
'and overgive, &c., in the hands of the said bailie, by delivering
'to him of staff and baton, as use is.' Sasine was then given, the symbols used being earth and stone; and the instrument, narrating all the clauses, was recorded in the burgh register. After Fleming's death, the magistrates granted a charter of confirmation of the sasine in favour of his sons, as heirs of provision of their father. The charter began in common form, and, after describing the lands, the titles of which were the subject of confirmation, stated, that 'they are to be holden with and
'under the several burdens, feu-duties, and others therein ex-
'pressed, and as mentioned in a feu-right of the lands made and
'granted by the Town Council of Glasgow, dated 7th May 1747.' It then ratified all the subsequent titles 'in the whole heads,
'articles, and clauses of the said writings, so far as the same
'regards the foresaid lands in the West Common, and so far as
'not contrary to, and inconsistent with, the original feu-rights
'of the said lands by our predecessors.' Thereafter these lands, after passing through several hands—being described in the titles in the same terms—and the conveyances containing procuratories

of resignation for services of burgh used and wont—and the disponees taking infeftment more burgi—and registering their sasines in the burgh records—came into the person of Adam Dawson, who, in like manner, by virtue of the procuratory of resignation in his disposition, took infeftment more burgi, and recorded the sasine in the burgh register. May 22, 1828.

Soon after acquiring the lands, Dawson erected a distillery on them, and the business of distilling was thenceforward carried on by him and Mitchell under the firm of Dawson and Mitchell.

By the original feu-contract, forming the foundation of Dawson's title, he was bound, by a clause of thirlage, to bring 'the 'whole grain which shall grow upon the said lands, and other 'stuff and corn which they shall happen to grind, to the town of 'Glasgow's mills, and grind the same thereat, seed and horse-'corn excepted, and pay multures and knaveships, and other 'services, used and wont.'

In 1815, Wilson, tacksman of the ladle-dues under the Magistrates of Glasgow, raised an action, before the Burgh Court of that city, against Dawson and Mitchell, for payment of ladle-dues, and multures on the grain imported by them, and used in their distillery for the year 1814.

The Magistrates found 'that the ladle-dues held in lease by 'the pursuer are leviable within the royalty or territory of the 'royal burgh of Glasgow; that in the title-deeds, the lands, on 'which the defender's distillery is situated, are described as lying 'within the territory of the burgh of Glasgow; that the Muir of 'Wester Common, of which these lands are a part, appears for-'merly to have belonged to the town of Glasgow as a corpora-'tion, and to have been included in the royal charters of erection 'and confirmation; that it is proved that these lands have been 'held by burgage tenure for upwards of 40 years; that the con-'version of the whole or part of the price into a perpetual annual 'ground-rent called a feu-duty, or ground-annual, is not incon-'sistent with the nature of burgage holding; that the validity of 'the tenure by which the lands are held cannot be competently 'questioned in an inferior Court;' and therefore found Dawson and Mitchell liable in ladle-dues. Thereafter the Magistrates found that the ladle-dues were leviable within the royalty or territory of the royal burgh of Glasgow, without any distinction, whether the lands were held in feu-farm, or by burgage tenure; and that, under the clause of thirlage, in the title-deeds, the defenders were bound to pay multures on the grain ground, bruised, or hashed, for the purpose of distillation, on the same principle as multures are exigible and payable under the same

May 22, 1826. clause, on grain prepared by malting and grinding for the purpose of brewing; and decerned for multures accordingly.

Dawson and Mitchell advocated; and Dawson, as an individual, raised an action of declarator, stating, that notwithstanding the tenor of the original feu-contract, the Magistrates and Town Council demanded from him and his tenants other duties and payments than those therein specified; that in particular, they demanded ladle-dues on the grain brought on his lands; that they insisted his lands were held by burgage tenure, and that he was liable in respect of these lands in burgage taxes and imposts, whereas the lands were held of the Magistrates and Town Council, as superiors in feu; and concluding that it should be declared that he was not liable, in respect of these lands, in payment of ladle-dues, or in any taxes or imposts of a burgage nature; that the lands held of the Magistrates and Town Council as superiors, by the tenure of feu-farm; that the town clerk of Glasgow had no exclusive privilege of acting as notary in taking infeftment thereon; and that the instruments of sasine fell to be recorded in the general register of sasines at Edinburgh, or in the particular register of sasines for the county in which the lands were situated.

The Lord Ordinary conjoined the two actions, and found, 'that the original grant of the land in question, by the Magi-'strates to John Young, in 1747, was really and essentially a 'feu-right, containing a specified feu-duty, and an express de-'claration that the same should be doubled upon the entry of 'heirs, and tripled on the entry of singular successors, voluntary 'or judicial, and containing a precept of clare* and all other 'clauses usual in feu-dispositions; and that it also subjects the 'feuars of the said lands to the thirlage of bringing their whole 'grain and other stuff, and corn they shall happen to grind, to 'the town of Glasgow mills, and grinding the same thereat, seed 'and horse corn, and bear excepted, and paying multures and 'knaveships, used and wont, but which multures can only apply 'to the subjects there astricted; that although the titles to these 'lands have since been completed by resignation in the hands of 'the Magistrates of Glasgow, more burgi, this does not seem to 'affect the original right, nor can it increase the nature of the 'burdens originally imposed on the subject, and which is re-'peated in the new investitures; therefore, with regard to the 'thirlage and multures to which these lands are subject, he 'found that these must be regulated by the clause in the origi-

* A mistake—should be sasine.

'nal feu-right, and which cannot be affected or altered by the 'title having been afterwards made up by resignation more 'burgi; and that the clause of thirlage in the original feu-right 'amounts to an astriction of omnia grana crescentia, but not 'to a thirlage of invecta et illata, and that a more extensive 'thirlage is not attempted to be made out, either by prescription 'or possession, since that period; therefore advocated the cause, 'and deerned in terms of the conclusions of the action of de-'clarator with regard to the thirlage;* but with regard to the 'other conclusions of the libel, and especially with regard to 'the conclusion that the infeftment should be recorded, not in 'the burgh, but in the county books, in respect of the case de-'cided by the Second Division of the Court, Davie v. Dennie, '2d June 1814, and in respect it is stated that a communis 'error, or general custom, has prevailed, and in consequence of 'which property of very great magnitude may be at stake, makes 'avizandum with that part of the cause to the First Division of 'the Court,' and appointed informations accordingly. Thereafter his Lordship having recalled the findings in above interlocutor, and reported the whole cause, May 22, 1826.

Lord Balgray observed. The magistrates are bound to give a title according to the contract of parties; and it is clear from the terms of the contract in 1747, that the title was to be burgage and not feu. No doubt, the magistrates stipulate for an annual payment, under the name of a feu-duty; but this is a mere name, and was not, and could not be intended to affect the nature of the tenure, which is distinctly expressed. I am also satisfied that the lands are within the territory of the burgh. They formed part of the common muir belonging to the burgh. If, therefore, these subjects are so situated, (and of this there can scarcely be a doubt,) they must necessarily fall within the original crown charter in favour of the burgh, and, of course, must be held burgage of the crown. In confirmation of their being burgage lands, there is evidence of the possessors having been in the practice of paying local and public taxes, on the assumption of their being within the burgh. But the stipulation of a feu-duty, or whatever you may call it, by the magistrates in favour of the burgh, can never alter the situation of the lands nor the nature of their tenure. The Crown, and by consequence its representatives, cannot dispense with or alter the

* This was a mistake; the question of thirlage having been discussed in the advocation, and there being no conclusion in the declarator relative to it.

May 22, 1826. law, and therefore cannot blend a feu and burgage holding together. In the charter of the burgh of Campbeltown (Thomson's edition of the stat. vol. xx, p. 204), the Crown stipulates for payment of a certain annual duty (p. 206), while the lands are to be held burgage: and certainly it cannot thence be inferred that they were to be held otherwise. But if the Crown can make such a stipulation, what is to hinder the Magistrates, who are the king's commissioners, from doing the same thing? The question here is one of very great importance, and I think a farther investigation should be made into titles of a similar description.

Lord President.—The opinion of Lord Balgray may be right in a general point of view; but I rest my opinion on the particular titles laid before us. If subjects be held burgage, it may be true that an annual payment may be stipulated: but observe what is the nature of the titles here. They are utterly inconsistent with the idea of the lands being burgage. There is, in the first place, a precept of sasine with a sasine taken upon it —then infeftment is given not more burgi, nor by hasp and staple, but by earth and stone—and then (which is quite absurd, on the supposition of their being held burgage) a charter of confirmation is granted. Perhaps the parties originally intended a burgage holding, but assuredly the titles made up by them and laid before us are not applicable to such a tenure. Whether they can cure the blunder, I do not know; but we cannot say these subjects are burgage, although no doubt they appear to be situated within the burgh.

Lord Balgray.—I rather think your Lordship proceeds on a mistake in feudal law. It is a general rule, that every man who has an unlimited right of property, may give a precept of sasine. There is an exception in the case of burgage property. But even in the original constitution of that species of holding, a precept of sasine is granted for taking infeftment. It is only in titles by progress that there is no precept. In the original constitution of a burgh, and in the division of the lands, the titles must be completed by sasine; and it is only in those by progress that a procuratory is given for resigning in the hands of the magistrates. Therefore, a precept of sasine is not, as is supposed, irreconcilable with the idea of the lands being burgage. Perhaps here the parties have committed a blunder in making up their titles, but that cannot alter the tenure of the lands.

Lord President.—The Magistrates, however, did not hold these lands as commissioners of the Crown. They belonged to them as proprietors and vassals, and as such they have feued them.

Lord Succoth.—I rather incline to be of Lord Balgray's opi- May 22, 1830.
nion; and besides, the lands are within the burgh; but the question requires farther consideration.

Lord Gillies.—It is not necessary to the decision of this case to go into the general rules of law. There is a plain distinction between res singulares and res universitatis as to the property connected with a burgh, and which has been overlooked both by the parties and by Lord Balgray. The lands in question were the private property of the burgh, and could be disposed of by the magistrates. Although situated within the burgh, yet, in relation to them, the magistrates were not the stewards or commissioners of the crown, but the proprietors. Now, all our institutional writers agree that the magistrates may feu the private property of the burgh; and therefore the question is, did the Magistrates of Glasgow do so in this case? But look at the terms of the original grant itself. By the dispositive clause, they 'give, 'grant, sell, annalzie, and in feu-farm and heritage perpetually, 'let and demit,' &c. Then there is a precept of sasine—infeftment is taken by the symbols of earth and stone—feudal casualities are created—and a charter of confirmation granted. It is clear, therefore, that these titles have been made up agreeably to the original dispositive clause by which the lands were conveyed in feu.

With regard to the ladles, they cannot be exacted if the lands be feu, because they are demanded only on the supposition of the lands being burgage, and it is admitted that hitherto they have never been exacted. As to the thirlage, again, the right to it must be regulated by the state of possession, and it has never been extended to invecta et illata.

Lord Hermand concurred with the Lords President and Gillies.

The Court then recalled the Lord Ordinary's interlocutor conjoining the advocation and declarator, and disjoined the two actions; and in the advocation remitted to the Magistrates of Glasgow, with instructions 'to alter the interlocutors complained of, to 'sustain the defences, and assoilzie the informants, Messrs Daw-'son and Mitchell, from the conclusions of the libel, and decern. 'And farther, in the action of declarator at the instance of Adam 'Dawson, they found, that from the conception of the original 'rights in favour of John Young, in 1747, and from the subse-'quent transactions relative to the property in question, and the 'form of the transmissions and conveyances thereof, as well as 'from the mode of expeding the infeftments, the pursuers are en-'titled to enjoy the lands and subjects described in the libel as a

May 22, 1826. 'feu-holding. But as to the conclusion relative to the town-clerk 'acting as notary, and to the recording of the infeftments, they 'appointed parties to be further heard, without prejudice to the 'taking and recording of the infeftments as formerly, in the 'meantime;' and to this judgment their Lordships afterwards adhered.*

The Magistrates and their tacksman appealed.

Appellants.—Ladle-dues are a tax exigible upon all grain imported within the royalty or liberty of the burgh of Glasgow. It is of no importance at what precise spot within the royalty it was originally collected—that would vary as convenience directed. But the respondent's land, and the distillery erected thereon, are situated within the royalty or territory of the burgh of Glasgow; and therefore grain brought on the lands are liable in these dues. It is proved by the titles of the respondent, that the lands are situated within the territory of the burgh. Besides, this is confirmed by the nature of the holding. No lands can be held by the tenure of burgage, without necessarily being within the burgh; and therefore, if the lands in question are held by that tenure, they must be considered as being within the burgh, and so liable to all the burgage taxes. But it is proved by the titles that such is their tenure. The circumstance of a feu-duty being stipulated cannot affect the express mode of holding. Such a stipulation is perfectly lawful, being in truth of the nature of a ground-annual, forming part of the consideration for which the lands were sold. Lands within burgh are sometimes held feu—such as those which formerly belonged to ecclesiastics;—but the tenure in these are uniformly declared to be feu, whereas here it is burgage. In like manner, the Magistrates and Town Council may, as a corporation, be proprietors of lands, and which they may dispone, to be held of them as superiors in feu; but where lands are held in burgage, it is the Crown who is the superior, and not the Magistrates, who are merely the bailies of the king.

In the present case, the tenure is expressly declared to be burgage, and infeftment has been taken for upwards of 90 years, more burgi, and the sasines recorded in the burgh register. Earth and stone were the proper symbols where the subject was land, and not houses; and any slight deviations from the usual mode of making up titles, as of burgage subjects, cannot alter the

* See 3 Shaw and Dunlop, No. 99.

tenure. But if so, then the lands must be considered as holding burgage, and consequently as situated within the burgh. Even, however, although the lands in question were held feu, still it is clear from the titles that they are within the burgh, and there is no inconsistency in their being so situated although held feu. The ladle-dues are exigible, not because the lands are held burgage, but because the grain has been brought within the burgh. When, therefore, the Court found that the lands in question were held in feu-farm, that did not exhaust the point at issue. The clause as to thirlage evidently includes grana invecta et illata. May 22, 1826.

Respondents.—The contract 1747 is in all its essential clauses a feu-right, and infeftment has followed according to symbols peculiar to feu-rights. The subsequent titles have been made up by resignation in the hands of the Magistrates as ordinary superiors, and not as commissioners of the King. They could not transform the feu-holding into a burgage-holding. It would have been illegal in them to have disponed by any other tenure than feu-farm. Having received, as ordinary superiors, the feu-duty for seventy years, a different set of prestations to a different superior cannot now be exacted. Besides, the lands are held for a feu-duty expressly declared to be pro omni alio onere. The lands in question do not lie within the burgh. If they had, they would have been held burgage, and not in feu-farm; and they have hitherto never paid other burdens than the feu-duty. Ladle-dues are only exigible on grain passing the ports of the burgh. But the respondent's lands are nearly a mile distant from the ports, through which the grain now attempted to be subjected to the ladle-duty, never in fact passes at all. As to the thirlage, considering the terms of astriction, the subject of the servitude, and the practice that has hitherto prevailed, no heavier astriction than that of grana crescentia can be inferred or imposed.

Lord Gifford.—Whatever be the holding, if the lands are locally situated within the territory of the burgh, and if grain be imported, (if I may use the expression,) must not the grain be liable in the dues? Has that point been settled? The Court of Session merely find that the holding is in feu-farm, and the arguments of the Judges are occupied by the question of tenure.

Robertson.—In the Bailie Court, the question was raised as to the situation of the lands—and the interlocutor of the Court of Session embraces both points.

Adam.—The Court proceeded on the tenure. If the lands

May 22, 1826. are held burgage, then our claim for ladle-dues stands good—if feu-farm, that does not exhaust the case; for we seek the dues, not in respect of the lands, but because the grain has been actually brought within the territory.

Robertson.—The question of locality has been, in effect, decided by the Court.

Lord Gifford.—But not directly. Of what consequence is the tenure, if the grain be actually brought within the territory of the burgh?

Adam.—Certainly of none. The person who brings the grain within the burgh must pay the dues. We say that the subjects are within the territory, and, as one article of evidence of the fact, we refer to the burgage holding of the lands. See the case of Dixon, 2d vol. p. 176, Shaw and Dunlop's Reports.

Lord Gifford.—I do not see what right the tacksman has to sue for multures.

Adam.—This right seems to have been taken for granted. The objection was not stated in the Court below—but we have no objection to your Lordship's observation, for we wish the case remitted.

The House of Lords ordered, 'That the cause be remitted back 'to the Court of Session in Scotland, for them to review gene- 'rally the interlocutors complained of; and in reviewing the 'same, they are particularly to consider, in the said action of 'advocation, Whether the Magistrates of Glasgow are entitled 'to any, and if to any, to what dues, in respect of corn or grain 'brought within the liberties or territory of the city or burgh of 'Glasgow, for sale, manufacture, or consumption; and if they 'are entitled to any such dues, then, whether the lands in the 'possession of the respondents are within such liberties or terri- 'tory? And it is farther ordered, that the Court to which this 'remit is made, do require the opinion of the Judges of the other 'Division, on the whole matters and questions of law, which 'may arise in this case, as well in the action of advocation as in 'the action of declarator, which Judges of the other Division 'are so to give and communicate the same; and after so re- 'viewing the interlocutors complained of, the said Court do and 'decern in the said causes, as may be just.'

Lord Gifford.—My Lords, the next case to which I will call your Lordships' attention, is the case of the Magistrates of Glasgow, against Dawson and Mitchell, and I shall be under the necessity of troubling your Lordships at some length in the detail of the proceedings, in order that

your Lordships may understand what the proceedings have been, and also the precise nature of the question which is submitted to your Lordships. May 22, 1826.

My Lords, the case, as it affects the appellants, and also as it affects the respondents, is of considerable importance. The question in this case relates to a demand, by the Magistrates of Glasgow, of certain tolls, which are denominated ladle-dues, in respect of grain brought to, and used in a distillery belonging to the respondents, and erected on part of a common near the city of Glasgow, and, as has been contended on the part of the Magistrates of Glasgow, within the liberty and royalty. Another question has been made in this case respecting the right of the Magistrates of Glasgow to certain multures or imposts, as they are called, namely, the right on their part to compel the occupiers of this distillery to grind all the corn and grain which shall be brought, either grown upon the lands belonging to this estate, or brought there, at the mills of the Magistrates of Glasgow. A third question also has been raised, in the course of these proceedings, respecting the tenure of the land on which this distillery has been erected.

My Lords, as I have stated to your Lordships, the Magistrates of Glasgow claim a right to exact these tolls, or ladle-dues, in respect of all corn, or grain, or meal, brought to the royalty or liberties of the burgh; the duty which they claim is called the ladle-due, from its being a ladle-full out of every sack, or load of meal or grain, frequently expressed by the general term of victual, imported or brought into the burgh. I have also stated to your Lordships, that they claim from the respondents, Messrs Dawson and Mitchell, a compensation for the grinding of the corn or grain which was used at their distillery, and in consequence of those claims having been resisted on the part of Messrs Dawson and Mitchell, proceedings were instituted by a person of the name of Wilson, who stated himself to be collector of the ladle-dues of the city of Glasgow, in the Burgh Court of Glasgow, against Messrs Dawson and Mitchell, to recover the sum of £89, 8s. 9d. in respect of those ladle-dues, and in respect of those multures, as they are called, namely, a compensation for the grinding of corn at those mills.

My Lords, in this original action before the Burgh Court of Glasgow, they claimed on the part of this gentleman, the collector of the ladle-dues, against John Mitchell and Company, distillers, Old Basin, Glasgow, defenders, that whereas the defenders 'are justly indebted and owing to 'the pursuer the sum of £89, 8s. 9d. for the reasons stated in a particular 'account herewith produced, and held as herein repeated brevitatis causa; and although the pursuer has frequently desired and required the 'defenders to make payment to him of the foresaid sum, which they as 'often promised to do, yet they now refuse, at least delay, unless compelled.'

Answers were put in to this proceeding by Messrs Dawson and Mitchell, in which they contended, 'that the pursuer had produced no title 'by which he could instruct his right to insist in the present action, and 'until he should do so, the respondents could not enter on their defence; 'they were confident, however, they should be able to satisfy the Court,

May 22, 1826. 'in the course of the future procedure, that they could not be subjected 'to the payment of the sum sued for, but that it was unnecessary, in 'hoc statu, to enter on the question. The respondents may also remark, 'that they have been erroneously cited to the action, under the firm 'of John Mitchell and Company, but they will waive any objection to 'the action arising out of this circumstance. When the pursuer shall 'have produced a title to insist in the action, your Honours will no doubt 'allow the respondents to answer farther.' My Lords, I own I cannot find that any sufficient title was ever produced, on the part of this gentleman, to maintain his action, and I should have thought that the objection taken by Messrs Dawson and Mitchell was decisive. He merely states himself to be collector of the dues, that is, the mere servant of the Magistrates of Glasgow, the parties to this suit, and, as such servant, I should have thought, he could not have any right to pursue in this action. However, my Lords, notwithstanding this preliminary defence on the part of Messrs Mitchell and Company, they appear afterwards to have put in special defences, in which they no longer insisted on this preliminary objection to the title to pursue as collector, but they put their case upon the merits, and say, we put him to show a right in his employers, the Magistrates of Glasgow, to that amount of rent they claim; and, accordingly, proceedings went on, on the merits of the case, without any farther objection in respect of the right of this person to pursue. In the interlocutor, it is supposed he held those dues in lease, but I cannot find that any evidence was ever given of any such lease.

My Lords, under these circumstances, I really feel that, after all the proceedings which have taken place in this cause, brought in the Burgh Court of Glasgow, and particularly in this advocation afterwards brought in the Court of Session, it will be too much now to say, that that preliminary objection should prevail; the respondents, appearing to have waived that objection to it, have gone on with Mr Wilson, and afterwards with the Magistrates of Glasgow, upon the merits of the case. At the same time, I cannot but much regret, that in a case of so much importance to both parties, there should be entertained any doubt with respect to the right of the pursuer to pursue in this action, and to bring into Court those very important questions which have been agitated in the course of these proceedings.

My Lords, the case then went on in the Burgh Court, and after some proceedings there, the following interlocutor was first pronounced by the Magistrates. (His Lordship here read the interlocutor.) Now, my Lords, another remark occurs here, with respect to the regularity of this proceeding, that this interlocutor is confined to the ladle-dues, whereas the demand of Mr Wilson was not only to the ladle-dues, but the multures, composing the great part of the demand. No notice, however, appears to have been taken of that omission.

The case was afterwards brought again before the Burgh Court, and this interlocutor was pronounced. (His Lordship read the interlocutor, and then noticed some farther proceedings in the cause.)

My Lords, the questions which were in agitation before the Court below having been exhausted, an advocation was brought by Messrs Dawson and Mitchell in the Court of Session, and in that advocation they contended, that the interlocutors ought to be set aside on certain grounds. In the first place, they stated, that their lands were not within the city, nor liberties thereof; in the second place, that the distillery was not situated within the royalty of Glasgow; and in the third place, they contended, that the pursuer had no right to demand multures on raw or unmalted grain consumed in distilleries, and that the only multures to which they were entitled, was in respect of corn growing upon the lands, upon part of which the distillery was erected. In this way the case came before the Court of Session, bringing before the Court those important questions which had been agitated, namely, the right of the Magistrates of Glasgow to exact those duties, in respect of corn or grain brought upon the lands in question—the defenders in the Court below contending, that the Magistrates of Glasgow had no right to exact those dues, in respect of lands which lie beyond the city or burgh; but next, they contended. that if this right extended to corn brought within that dominion, round the town, which may be considered as being within the liberties or territory, still they were not bound to pay those dues, inasmuch as their lands were not situated within that territory; and next, they contended, that the pursuer had no right to demand multures on raw or unmalted grain, consumed in the distillery, or, according to the language of Scotland, on corn or grain brought there for the purpose of manufacture. May 22, 1826.

My Lords, in consequence of the case having been thus brought before the Court of Session, another action was instituted by Mr Dawson, the proprietor of the lands of Wester Common, in the nature of an action of declarator. The summons in that action, after setting out the title under which he held those lands, sought to have it declared by the Court of Session, 'That the pursuer is not liable, in respect of his lands aforesaid, 'in payment of the said dues called ladles, or in any taxes or imposts of 'a burgage nature; and the same being so found and declared, the Ma-'gistrates and Town Council, and the said Robert Wilson, their tacks-'man,' (treating here again Wilson as the tacksman of the Magistrates of Glasgow), 'ought and should be decerned and ordained, by decree afore-'said, to desist and cease from troubling the pursuer, in respect of his 'lands aforesaid, by the exaction of the foresaid dues called ladles, or any 'other taxes or imposts of a burgage nature; and that it should be found 'and declared, that the foresaid lands of Wester Common hold of the 'said Magistrates and Town Council, by the tenure of feu-farm, and that 'the town-clerk of Glasgow has no exclusive privilege of acting as notary, 'in the taking of infeftment in the lands, and that instruments of sasine 'thereon fall to be recorded in the general register of sasines, at Edin-'burgh, or in the particular register of sasines for the county or regality 'in which the lands are situated.'

Your Lordships perceive, therefore, that this action brought before the

May 22, 1826. Court of Session another question, namely, respecting the tenure of the lands held by Mr Dawson—he contending by this action of declarator, that his lands were not held in burgage, but in feu-farm, and also, that in respect of the lands, he was not liable to pay any ladle-dues, or any taxes or imposts of a burgage nature.

This action came before Lord Alloway, and he conjoined it with the process of advocation (a mode of proceeding in the Court of Scotland, of conjoining two actions which are supposed to involve questions of a similar nature), and this conjoined action coming on before Lord Alloway as Lord Ordinary, he, on the 20th of December 1817, pronounced the following interlocutor. (His Lordship here read the interlocutor.)

Your Lordships will perceive, that by that interlocutor the Lord Ordinary decided with respect to the thirlage, but it appears the question was suspended with respect to the dues.

The case came afterwards before the Court of Session, on the 18th of November 1823, and they pronounced an interlocutor, by which they 'recall the interlocutor, conjoining the action of advocation with the process of declarator, and disjoin the said two actions; and in the action of advocation, remit the same to the Magistrates of Glasgow, with instructions to alter the interlocutors complained of, to sustain the defences, and assoilzie the informants, Messrs Dawson and Mitchell, from the conclusion of the libel, and decern.' They, therefore, in the action of advocation, determined in favour of Messrs Dawson and Mitchell, sustaining their defences and assoilzieing them from the conclusions of the libel. The effect of this interlocutor was to adjudge, that Messrs Dawson and Mitchell were not liable in respect of the ladle-dues; and also to find, in conformity to the interlocutor of the Lord Ordinary, that the multures were only due in respect of grain ground, bruised, and hashed;—'and farther, in the action of declarator at the instance of Adam Dawson, they find, that from the conception of the original rights in favour of John Young in 1747, and from the subsequent transactions relative to the property in question, and the form of the transmissions and conveyances thereof, as well as from the mode of expeding the infeftments, the pursuer is entitled to enjoy the lands and subjects described in the libel as a feu-holding; and, therefore, repel the defences applicable to the first and second conclusions of the libel, and also to the manner of holding, and decern and declare, conform to the said conclusions, accordingly; but, in so far as regards the other conclusions relative to the town-clerk of Glasgow acting as a notary, and to the recording of the infeftments, they, supersede the consideration thereof, and appoint parties to be further heard thereon, without prejudice to the taking and recording the infeftments, as formerly, in the meantime.'

My Lords, there was a reclaiming petition presented, but, on the 15th of June 1824, the Court of Session, on considering the reclaiming petition, refused the desire of it, and adhered to the interlocutor reclaimed against.

My Lords, it is fit I should state to your Lordships, that upon the matter being discussed before the Court of Session, the great question that was agitated there, was respecting the tenure of these lands. It was contended, on the part of the Magistrates of Glasgow, that these lands were held in burgage. On the part of Mr Dawson, it was contended, that these lands were held in feu-farm; that, therefore, they were only liable to the tolls, dues, and multures, expressed in the feu-contract; and that, in respect of the land so held, it was not liable to pay any dues for any of the corn or grain brought there for the purpose of manufacture. Very learned arguments, and at great length, were employed upon that very nice, and, perhaps, difficult question; and the Court of Session were much divided in their opinions, with respect to some of these points,—two of the learned Judges being of opinion, that they held in burgage,—three others being of opinion, that the instrument under which these lands had been held, and the nature of the provisions of that instrument, particularly in respect to the symbols used, showed that they were held in feu-farm. It does appear to me, with great submission to the Court of Session, that they have overlooked one question, namely, Whether the Magistrates of Glasgow were entitled to those dues, in respect of the grain brought upon these lands? because that did not depend altogether upon the nature of the tenure. It is very true, that if they had been of opinion those lands were burgage, it would seem to follow as a necessary consequence from that, that they must be considered either as being within the burgh, or the territory and liberty of the burgh; and, therefore, if they had come to the conclusion, as far as the locality of the lands was concerned, that they were either within the burgh, or the territory or liberty, and that the Magistrates of Glasgow had a right to exact those dues, not only within the burgh, but the territory and liberty, they would have come to the result, that the Magistrates of Glasgow had a right to those dues. But when they determined that those lands were not held burgage, but feu, it did not necessarily follow from thence, that the Magistrates of Glasgow, represented by Mr Wilson, had not a right to ladle-dues from Messrs Dawson and Mitchell, in respect of the corn brought there; for it was not a claim made in respect of the tenure of land, but in respect of the corn and grain having been brought either for consumption, or use, or sale, within the liberty or territory of the burgh;—the Magistrates of Glasgow contending, that they were entitled to the dues on corn and grain so brought; and I find, that almost all the learned Judges were of opinion, that notwithstanding that the lands were held feu, they were within the territory of the burgh; for I find, at the conclusion of my Lord President's judgment, pronounced in the year 1823, he says, 'I think these lands 'are within the territory of the burgh.' Lord Succoth, who had been of a different opinion from the Judges with respect to the tenure, says, 'I 'am convinced the lands are within the territory of the burgh.' Lord Gillies says, 'I am of the same opinion.' Lord President—'I am of the 'same opinion also.' So that these learned Judges, although they were

May 22, 1826.

May 22, 1826. of opinion that those lands, being held feu, were not liable to any other dues than those which the feu-charter imposed, or to any burgh taxes or imposts, were of opinion, that, in point of locality, they were within the territory of the burgh. Then, if they were, comes a question which is distinctly raised in the process in the Court below, Whether the Magistrates of Glasgow had a right to those dues, in respect of corn or grain brought upon this land held by Messrs Dawson and Mitchell,—this land being, as the Court thought, within the territory of the burgh? They appear to me to have at once held, without going at all into that question, that the lands being in feu, the consequence of that conclusion necessarily was, that those gentlemen were not subject to the payment of these dues, but that they were entitled to a judgment assoilzieing them from the demands made against them by Mr Wilson, the collector of these dues. I must confess I do entertain a very grave and serious doubt, whether the conclusion of the Court of Session, in that respect, was a right conclusion,—they appear to have overlooked the nature of this claim, which was not a claim in respect of the tenure of the lands. Whether the lands were feu or burgage, made no difference to the Magistrates of Glasgow, if they could make out that they were subject to this claim, it being a claim for the corn brought upon these lands, and sold or used by Messrs Dawson and Mitchell.

With respect to the multures, undoubtedly the question appears to have been referred to, but not very much entered into, by the Court of Session. The Lord Ordinary was of opinion, that, looking at the terms in which the thirlage had been reserved in the grant, and the nature of the lands, it was to be restricted to grana crescentia. The terms are these, 'bringing 'their whole grain and other stuff and corn they shall happen to grind, to the 'city of Glasgow's mills, and grinding the same thereat, seed and horse corn 'and bear excepted, and paying multures and knaveships used and wont.' Your Lordships see, that it thus subjects the feuars of the lands to the thirlage of bringing their whole grain and other stuff and corn they shall happen to grind, to the city of Glasgow's mills. Upon this question coming before the Court of Session, as I have already stated, their attention was principally directed to the other—the important question—and though the result of their judgment is, that the Judges of the Court of Session coincide with the Lord Ordinary, it does not appear, from the notes handed to me of the speeches made upon that occasion, that they go very much into this question of the thirlage. I observe one of the learned Judges, my Lord Hermand, dropped a very few words upon that subject; the other Judges go at great length into the question of tenure, but hardly any of them advert, at any length, to this question of the multures, but they conclude that the thirlage is restricted to grana crescentia.

My Lords, upon the question of tenure, I have stated to your Lordships very elaborate judgments were given, and great difference of opinion expressed; and I find from these learned Judges, that this is a question not only of great importance between these parties, but of very great

importance, as it affects lands not only in the burgh of Glasgow, but in other burghs. My Lords, it is a little singular, that if these lands are held in feu-farm the register of sasine has always been in the burgh courts. Perhaps it is hardly necessary for me to state to your Lordships, that where lands are holden in feu-farm, it is enacted by the statute 1617, chapter 16, that for all reversions, regresses, bonds, assignations, and so forth, there shall be one public register, and it appears by that act, that for the greater ease of the lieges of the various places therein mentioned, there shall be a special register appointed in each of them; and it is left by that statute, to every one's option to register in any of those places which may be most convenient to them, provided they did not choose to register them in the general register. But burgage sasines are excepted. May 22, 1826.

My Lords, as I have already stated to your Lordships, it is in evidence, and not denied in this case, that all the sasines of these lands, and which are supposed to be held in burgage, have been registered in the burgh court of Glasgow. Your Lordships perceive, that in the action of declarator brought by Mr Dawson, after having concluded, that it might be decerned that those lands were holden in feu-farm, he also concludes to have it declared, that the instruments of sasine therein fall to be recorded in the general register of sasines at Edinburgh, or in the particular register of sasines for the county or regality in which the lands are situate. But in the interlocutor pronounced by the Court of Session, although they have adjudged these lands to be holden in feu-farm, they have inserted this reservation:—'But in so far as regards the other conclusions relative to the town-clerk of Glasgow acting as notary, and to the recording of the infeftments, they supersede the consideration thereof, and appoint parties to be farther heard thereon, without prejudice to the taking and recording of the infeftments.'

My Lords, I may just remark, that one ground on which some of the Judges appear to have proceeded in coming to the conclusion, that these were lands held in feu-farm, was the nature of the symbol employed in the delivery of sasine, namely, earth and stone, and that those symbols were never used in relation to lands held in burgage. Upon that subject it is not my intention to detain your Lordships, but I think, upon the authorities cited at your Lordships' Bar, as well as that stated by Mr Erskine, upon the subject of the symbols, perhaps no great reliance can be placed upon that circumstance. I apprehend, that where a property, consisting of houses and buildings, is held burgage, the proper symbols to be used are certainly those of hasp and staple; but I apprehend, looking at the authorities, that it cannot be said, that where it consists wholly of lands, earth and stone are not the proper symbols to be used in giving sasine, because I do not know what other symbols could be used. I will just call your Lordships' attention to that which is stated by Mr Erskine upon this subject. In respect of symbols, he says, 'The symbols by which the delivery of a feudal subject is expressed, are different, according to the different nature of the

May 22, 1826. 'subjects that may be made over by a superior.' He does not say they are according to the nature of the tenure of the subject, but according to the different nature of the subject. 'The symbols for land are earth and 'stone; for mills, clap and happer; for fishings, net and cobble; for par- 'sonage tithes, a sheaf of corn; for tenements of houses within burgh, 'hasp and staple; for patronages, a psalm-book and the keys of the 'church; for jurisdictions, the book of the court, &c. Sometimes sym- 'bols are authorised by custom to stand in place of delivery, which have 'no resemblance to the subject conveyed. Thus, the symbol in resigna- 'nation, which was originally a pen, has been now, for centuries past, 'staff and baton, which hath nothing analogous, either to the subject re- 'signed, or the act of resigning;' then he says, that 'Stair and Macken- 'zie are of opinion, that the symbol of a right of annualrent is either a 'penny money, if the annualrent be payable in money, or a parcel of corn 'or victual, if it be payable in victual;' so that I think, my Lords, that it is to be inferred, from what Mr Erskine states, that the symbols by which the delivery of a feudal subject is expressed, vary, not according to the nature of the tenure of the subjects to be conveyed, but according to the nature of the subjects themselves. Therefore, where land is conveyed, I should apprehend, with great deference to the Court below, (though that land may be situated within the liberty of a burgh,) earth and stone would be as proper symbols to be employed in the delivery of that subject, as those of hasp and staple, where a house was to be conveyed.

My Lords, I mention this only, because I do observe that some of the Judges placed very great reliance upon those symbols which were used upon this occasion; while others of them went at great length into the form of the different charters used in transfers of this property. I shall, however, avoid expressing any opinion upon this subject, for this reason, that, considering the great importance of it, not merely as applying to Glasgow, but as applying generally to property situate in burghs, and considering, too, the great difference of opinion of the Judges upon this subject, involving the titles of a very large proportion of property in burghs, I should really venture humbly to submit to your Lordships, that this is a case which requires farther consideration of the Court of Session, and that it would be extremely desirable, in a case of such great magnitude, not only that the Division before which this cause came should review the interlocutors they have pronounced upon this subject, but that your Lordships should have the advantage of the opinion of the other Division of the Court upon this, which I consider a question of great importance.

Your Lordships are aware, that with respect to Scotch causes, you have not the advantage which you have in English causes, of obtaining the opinions of the learned Judges to assist you in your decisions. Where a case of great legal importance occurs in an appeal, or a writ of error brought before your Lordships from any of the Courts of Westminster Hall, your Lordships are in the habit of calling for the assistance of the learned Judges, and of receiving from them their deliberate

opinions upon the questions proposed by your Lordships. In order to obtain the same object, in respect of cases of importance decided in the Courts of Scotland, it was usual, before the Court was formed into two Divisions, that all the Judges acted together, and your Lordships, therefore, had an opportunity, on an appeal, of knowing what the opinions of all those learned persons were. But even in those cases it was not uncommon, but, on the contrary, I believe, very frequent, in the time when Lord Thurlow presided in your Lordships' House, to remit to the Court of Session cases of importance, that they might be considered; and since the division of the Court into two Divisions, where a case of great importance has been heard before one Division of the Court, and there has been a difference of opinion among the Judges,—three being of one opinion, and two of another,—a desire has often been expressed on the part of your Lordships, that the Division before which the cause was heard, would do that which they have a right to do, namely, call for the opinions of the Judges of the other Division, in order that, if the case should ultimately come before your Lordships upon an appeal, you might have the advantage of knowing what the collective opinions of the whole, and the individual opinions of the Judges of each Court were, upon the case before them. In this case, I very much lament, that the First Division, before which this cause was heard, did not take the opinion of the other Division, for this reason, that the question is admitted to be one, not only of great importance, but the decision of which may affect property to a large extent in Scotland. It was a case upon which they themselves entertained a great variety of opinions, and therefore it appears to me it would have been very desirable, that they should have taken the opinion of the other branch of the Court. As they have not done so, I feel that, out of respect to the law of Scotland, and distrusting, as I think your Lordships would, your own opinion upon a subject of this nature, without having all the assistance which you may have to enable you to come to a conclusion, I think it most respectful to the Judges of the Court of Session, and most satisfactory to this House, to move your Lordships, that this case be referred back to the Division from whence it came, for their review; and that they should be directed to take the opinion of the other Division of the Court upon the case. May 22, 1826.

My Lords, I cannot help thinking also, as I have already mentioned, that the finding of the Court of Session has not decided one of the questions which was raised in the proceedings in the burgh court;—I mean, the right of the Magistrates of Glasgow to exact those dues. If the determination should be ultimately, that these lands were holden burgage, contrary to the decision which has been already expressed (which I have no right to expect), that might determine the question with respect to the locality of these lands. If, on the other hand, the majority of the Judges should adhere to the opinion already expressed, that these lands are holden in feu-farm, still it appears to be the opinion of several of the Judges at least, that if they are holden in feu-farm, they are still within the territory or liberty. Then comes the question, whether, if they are within the territory or liberty, the Magistrates of Glasgow have a right to exact the dues on

May 22, 1826. the corn or grain brought within that territory?—That question has never been determined. Evidence has been gone into to support the right on the one hand, and the effect of that evidence is contested on the other, but that question has never received a solemn decision. It does appear to me, therefore, my Lords, that the case must be remitted to the Court of Session—the advocation as well as the action of declarator—for the opinion of the learned Judges upon that subject, as well as for further inquiry upon it.

My Lords, with respect to the question of thirlage, if it had not been my intention to propose that the cause should be remitted, perhaps your Lordships would have come to a decision upon that question, though it does not appear to have received so much discussion and deliberation as it perhaps deserves; but as I shall advise your Lordships that the case should go back upon the other questions, it appears to me respectful to the Court of Session, that they should have an opportunity of reconsidering that question at the same time they are considering the rest. I do not mean to express any opinion which can be considered as operating upon the minds of the learned Judges, either upon that, or upon any other question in the cause,—my opinion being, and if that opinion should be sanctioned by your Lordships, the opinion of your Lordships' House being,—that the question is of so much importance and so much difficulty, that it ought to be reconsidered by the learned Judges of the Court of Session, before whom it has already been, and that your Lordships ought to have the opinion of the other Division of the Court; that with respect to the right of the Magistrates of Glasgow to exact these dues, and the question of locality of these lands, those questions have not been sufficiently considered by the Judges in the Court below; that the case therefore should be considered further by them; and with respect to the thirlage, that that also should be reconsidered by them. My proposition, therefore, will be, that this cause should be remitted back to the Court of Session, for them to review generally the interlocutors complained of; and that in reconsidering it, they should consider whether the Magistrates and Town Council of Glasgow are entitled to any, and if to any, to what dues, in respect of the corn and grain brought within the territories of the royal burgh of Glasgow; and if they are entitled to such dues, whether the lands are within the territory of the burgh of Glasgow. I would move your Lordships farther to direct, that the Division of the Court of Session to which this remit is made, shall require the opinion, in writing, of the Judges of the other Division of the Court. Such is the nature of the judgment which I mean to propose to your Lordships. I will delay presenting it formally to your Lordships until you meet again, in order that I may take care that the questions which I propose should be considered by the Court of Session, should be distinctly stated in the judgment, that there may be no misunderstanding in the Court below, with respect to the nature of the inquiries, or the nature of the consideration of the question, which your Lordships wish to have entered into;—the substance of the judgment, I shall propose to your Lordships to pronounce, being, that the cause shall be remitted to the Court of Session, for them to consider, not

only the question of law, but the questions of fact. I would now propose, therefore, to postpone the further consideration of this case till Monday next. In the meantime, I will prepare the form of the remit to the effect I have expressed to your Lordships. May 22, 1826.

Appellants' Authorities.—Burgh of Rutherglen, 4th June 1575. Burgh of Lanark, 28th June 1594. Balfour's Practicks, p. 73. Brewers of Glasgow, 20th Jan. 1761. Bakers of Glasgow, 5th June 1792. 1 Craig, 10. Hutchison's Justice of Peace, 2. 46. 3 Ersk. 8. 72. 1 Juridical Styles, 551. Bell's Treatise on Conveyance to Land, p. 120. 2 Ersk. 9. 27. Dixon, Feb. 1, 1823, (2 Shaw and Dunlop, No. 161.)

Respondents' Authorities.—1 Bankton, 561. 1 Juridical Styles, 8. § 1. 2 Stair, 3. 38. 2 St. 3. 17. 2 Ersk. 4. 8. 2 Ersk. 3. 36. 1 Craig, 10. 31. and 36. 1491, c. 36—1593, c. 185. Hope's Minor Practicks, page 321. Wight on Elections, 209. Cathie, 30th June 1752, (2521.) Dean, 3d July 1752, (2522.) 1 Bell on Deeds, 466. Town of Inverness, 14th July 1674, (10893.) 1 Stair 4. 45. 5. 4 Ersk. 2. 36. Town of Perth, 16th Jan. 1711, (11861.) 2. Ersk. 9. 27. Duke of Buccleuch, 25th June 1767, (16053.) Yeaman, 17th Nov. 1759, (16044.)

J. RICHARDSON—A. MUNDELL—Solicitors.

ROBERT SPIER, Trustee on John Dunlop's Sequestrated Estate, Appellant.—*Adam.*—*Jas. Campbell.* No. 22.

JAMES DUNLOP, Respondent.—*Shadwell*—*Buchanan.*

Bankrupt—Stat. 1696, c. 5.—A Jury having found, that within sixty days of an admitted bankruptcy, the indorsee of a bill accepted by a bankrupt, did not enter into an agreement or concert with the bankrupt for the purpose of obtaining security and payment of the bill; but that the indorsee, by means of a sale of the bankrupt's heritage, did within the 60 days obtain from him a sum of money as a provision for payment of the bill when it became due; and the Court of Session having held this transaction not to be reducible under the act 1696,—the House of Lords remitted this latter point for reconsideration.

THE affairs of John Dunlop, grocer and baker in Stewarton, in the county of Ayr, having fallen into embarrassment, his estate and effects were sequestrated under the bankrupt statute, and Spier was appointed trustee. In this capacity, he thereafter raised an action against James Dunlop, the bankrupt's nephew, stating that the bankrupt and another nephew had got involved together in money transactions; that finding it necessary to raise money, Ferguson drew a bill, on the 6th of September 1820, on the bankrupt for £220, which was accepted by him, payable three months after date, in favour of James Dunlop, who indorsed and discounted it with the agent for the Commercial Bank at Beith: That thereafter, and during the currency of the bill, Ferguson having become bankrupt, and James Dunlop having learned that May 22, 1826.

2D DIVISION. Lords Mackenzie and Eldin.

May 22, 1826. his uncle John was insolvent, entered upon a collusive contrivance with him, to obtain a partial preference over his other creditors, by which it was arranged that the bankrupt should, by means of a private sale of certain houses and land belonging to him, raise a sum to be put into the hands of James, for his security and relief: That accordingly James prevailed on Dunlop of Fairfield, who was also his uncle, to give him a bill for £600, with power to apply the contents in making a purchase in name of Fairfield, of the property belonging to the bankrupt, upon an assurance from James, that he would warrant the subjects to be worth upwards of £600: That James immediately prepared a disposition of them, to be executed by the bankrupt in favour of Fairfield, which disposition he got extended by a man of business, and proceeded to Stewarton, the residence of the bankrupt, who subscribed it on the 18th October 1820: That James, having discounted the £600 bill, paid the proceeds to the bankrupt, who immediately out of that money gave to James £220, in relief of the bill which was due on 9th December following: That the bankrupt's estate and effects were sequestrated on the 2d of December: That James was a conjunct and confident person; and that the transaction, being intended to bestow a partial preference on James, was reducible, both at common law and in terms of the statute 1696, c. 5.

Prior to the institution of this action, James Dunlop had been examined judicially on oath, under a provision of the bankrupt statute, and in substance deponed agreeably to the statement made in the summons, but denying collusion.

Lord Mackenzie, as Ordinary, after ordering a condescendence and answers, and disregarding a note by the pursuer, praying to be heard on the evidence arising from James Dunlop's oath and other evidence in process, remitted the case to the Jury Court. An issue was then sent to the Jury in these terms: 'It being admitted that a bill for £220, dated 6th September 1820, payable three months after date, and due on the 9th of December 1820, accepted by John Dunlop, was indorsed by James Dunlop, and discounted at the branch of the Commercial Bank at Beith, previous to the 18th October 1820: It being also admitted that the estate of the said John Dunlop was sequestrated on the 2d day of December thereafter: It being also admitted that the said John Dunlop sold to William Dunlop, uncle to James, certain houses for the sum of £600, on 18th October 1820.

'Whether, within sixty days of the admitted bankruptcy of the said John Dunlop, the defender, James Dunlop, did enter

'into an agreement, or concert, with the said John Dunlop, the bankrupt, for the purpose of obtaining security or payment of the aforesaid bill for £220, and did for that purpose contrive and assist in carrying into execution the sale of the bankrupt's heritable property, aforesaid? And whether the defender, by means of the said sale, did obtain from the said John Dunlop the sum of £220 out of the proceeds of the said sale, on the said 18th day of October 1820, or previous to the 9th day of December 1820, in satisfaction of the said bill, or as a provision for payment of the said bill, when it became due?' May 22, 1826.

The Jury found, 'That within sixty days of the admitted bankruptcy of the said John Dunlop, the defender, James Dunlop, did not enter into an agreement or concert with the said John Dunlop, the bankrupt, for the purpose of obtaining security, or payment, for £220; and that the defender, James Dunlop, by means of the said sale, did obtain from John Dunlop, by the hands of his wife, £220, on the said 18th October 1820, as a provision for payment of said bill, when it became due.'

This being a special verdict, went back to the Lord Ordinary to be applied, when Lord Eldin, who had come in place of Lord Mackenzie, 'in respect of the defender's admission that he applied to his uncle, William Dunlop, to purchase the subjects in question; that William granted the bill for £600 as the agreed-on price of the subjects, which bill the defender discounted at the Paisley Bank, and did so with an extraordinary degree of haste, at a late hour of night, for which he has not sufficiently accounted; and that the defender having paid over the money to the bankrupt's agent, who paid it over to the bankrupt himself, the defender some hours after received £220 of the same money from the bankrupt, for the admitted purpose of relieving the defender of a bill to that amount, which had been indorsed by him, and discounted by the Bank; that the sale of the subjects and payment to the defender took place within 60 days of the bankruptcy; but the bill of which the defender was so relieved was not payable until the 9th December, more than seven weeks after the date of the sale and payment to the defender; that the defender evidently had a view to his own relief in the transacting of the sale, and that the verdict of the Jury, though it is silent with respect to some of these circumstances, contains nothing sufficient to take off their effect:' Found, 'that the sale and payment to the defender was an evasion of the act 1696, and that it would be dangerous to give legal effect to a transaction of such a nature. And in respect of the decision

May 22, 1826. ‘ of the Court in the case of Barbour v. Johnstone, 30th May ‘ 1823,’ reduced, declared, and decerned in terms of the libel, and found the defender liable in expenses. Thereafter his Lordship, ‘ In respect that a material part of the verdict is against the re- ‘ presenter (the defender), found that he had no claim to the ex- ‘ penses incurred in the Jury Court, or to any of his previous ‘ expenses.’ Found, ‘ That the issues in the Jury Court did not ‘ comprehend all the points in dispute between the parties, and ‘ that upon the verdict, and the facts admitted by the representer, ‘ and the other circumstances, there were sufficient grounds for ‘ the interlocutor reclaimed against.’

The defender petitioned, and the Court, on advising petition and answers, recalled the interlocutor complained of, and found that ‘ the judgment in this case must proceed on the verdict of ‘ the Jury alone, and appoint parties to be heard in presentia on ‘ the import and effect of the verdict, reserving consideration of ‘ the petitioner’s present demand for expenses, and all other ‘ claims for expenses, on either side, till the issue of the cause. Counsel having accordingly been heard, the Court, on the 16th June 1825, repelled the reasons of reduction, assoilzied the defender from the conclusions of the libel, and decerned, and found the defender entitled to expenses.*

Lord Pitmilly.—In deciding this case, we must be governed entirely by the verdict of the Jury. Perhaps a remit to the Jury Court was unnecessary, as the pursuer had a much better case under the admissions of the defender. But the verdict is exclusive of every other evidence, and therefore we must look to it alone. Now the verdict completely negatives the allegation of concert or contrivance; and all that remains as a ground of reduction, is the payment of money to retire a bill not yet due. Payment of money, however, is one of the exceptions from the act 1696, unless when accompanied by fraud, which is now out of the question in this case. The only difficulty arises from the payment having been made before the bill fell due; but that is not a relevant circumstance. The only effect of it would be as a proof of fraud, which, however, is negatived by the Jury; and in no other view can it have the effect of bringing the payment under the act 1696.

Lord Glenlee.—I rather think that the admissions of the defender were not sufficiently broad to decide against him before the remit; because the material circumstance which is proved by the verdict is, that the money was given to him as a provi-

* See 4 Shaw and Dunlop, No. 74.

sion for payment of this bill when it should fall due. There may possibly be cases where payment of a bill, before it becomes due, is not suspicious: as, when a party has money in his hands for which he has no immediate use, he may perhaps purchase up his own bill before it becomes due. In this case, however, the money was not given to the defender to take up the bill at the time, but as a deposit, that he might take it up when it did become due. It was a depositation, to secure him against eventual loss, in case the bill should not be paid; and this depositation cannot be sustained, without establishing the doctrine, that a bankrupt may, within 60 days of his bankruptcy, give money to persons bound for him in cautionary obligations, to secure their relief when that obligation is actually operated on. May 22, 1826.

Lord Robertson.—I entirely concur in what has been said by Lord Pitmilly.

Lord Alloway.—I was not present when the interlocutor was pronounced finding that this case must be decided entirely by the verdict; but I completely concur in that judgment, and also in the opinion which has now been delivered by Lord Pitmilly. We, therefore, cannot travel out of the verdict, and must confine ourselves to it alone. But the verdict negatives the allegation of fraud and contrivance, and consequently we must lay that out of view. The question thus comes to be, whether a payment in order to retire a bill before it falls due, be struck at by the act 1696? But it has been established, that payments in cash are exceptions from the rule of it; and if an obligation be in existence, I cannot see why a payment in cash, made with a view to its extinction, should be liable to be set aside. Perhaps it might have been a circumstance in support of the allegation of fraud, that the payment was made before the debt was due; but that allegation is negatived. In any other respects, it is of no importance, and particularly in a question under the statute, because it is admitted on all hands, that payments in cash, as to subsisting obligations, are not subject to be reduced.

Lord Justice-Clerk.—It is clear that the Court cannot go beyond the verdict in deciding this case. They are, however, bound to look at the summons, which is important, as establishing the defender to have been a creditor at the date of the payment in question; and it is not stretching this too far to adopt the explanation made by the defender's counsel, that he had paid the bankrupt £220 for the bill, and then discounted it. He was therefore a creditor at this time, and cannot be viewed in the light of a cautioner; for, if he was to be so considered. Lord

May 22, 1826. Glenlee's observations would have great weight; but being a creditor, and receiving payment in money, without any fraud or contrivance, as must be held under the verdict, the transaction is neither objectionable at common law, nor under the act 1696.

Spier appealed.

Appellant.—The Court have not judged correctly in restricting the pursuer to the facts which have been found by the verdict, and thereby excluding him from any aid which may be derived by him from the judicial and solemn admissions made by the respondent on oath. Although the Jury found that the defender did not enter into an agreement or concert with the bankrupt, that cannot exclude the pursuer from showing, by the defender's own judicial admissions, that he accomplished this sale by a fraudulent contrivance or device. Besides, supposing the appellant is to be restricted to the verdict, the issues did not embrace all the points of the case, and therefore new issues of a more comprehensive nature ought to be sent to a Jury. But even taking the verdict as it stands, the facts there found are sufficient to entitle the appellant to decree in terms of the libel, in virtue of the statute 1696 c. 5, which applies to every deed or transaction by which a bankrupt attempts to confer a preference on any of his creditors to the prejudice of the others, within sixty days of his bankruptcy. The present is not a case of bona fide payment in the ordinary course of business. The money has been found to have been obtained 'as a provision for payment of said bill when it became due.' But that is just another expression for a deposit in security. The bankrupt was the acceptor of a bill payable at a future date, and for this bill the respondent was liable in the event of the bankrupt's failure to pay it; and therefore the act of the bankrupt, in putting into the respondent's hand money before it was due, as a provision to retire it when due, is a fraud at common law, and struck at by the statute.

Respondent.—The issue sent to the Jury was prepared on the suggestion, and with the approbation, of the appellant himself. The verdict has been acquiesced in. If he had been dissatisfied, he should have applied for a new trial; but not having done so, the Court were bound to assume the verdict as the sole basis of their judgment. The verdict negatived every charge of fraud, and, therefore, is conclusive against any challenge at common

law. For where there is no fraud, a creditor is entitled to take payment in money of a just debt, whenever that payment is offered him by the debtor. Even on the statute 1696, the transaction is not challengeable. Payments in cash are not deeds within the meaning of the act. It is no answer to say, that the bill was not due. The respondent had advanced its contents; and the bankrupt was his debtor as much as if the bill had been past due. Besides, a creditor is entitled, in many instances, to sue his debtor, although the time of actual payment may not have arrived. The statute merely strikes at conveyances to creditors in security of debts. But payment before the day of payment is only anticipated payment, not security; and the statute only strikes against voluntary securities. May 22, 1826.

The House of Lords ordered, 'That the said cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and to consider whether, consistently with the findings of the Jury, the payment or deposit of the £220 was or was not reducible under the provisions of the statute 1696, or otherwise; and after reviewing the said interlocutors complained of, that the said Court do and decern in the said cause as may be just.'

Lord Gifford.—My Lords, another case, to which I shall call your Lordships' attention, is that of Spier *v.* Dunlop, which it is my painful duty to ask your Lordships to remit to the Court of Session, being of opinion that there are questions remaining in that case to be considered by the Court of Session.

When I say I ask your Lordships with reluctance to come to this conclusion, I only do that which I think the Division of the Court of Session, before which the cause originally came, would have done, if they had viewed the case in the light I am proposing to do. If they had so viewed it, they themselves would have done it: but they considered themselves shut out from so looking at it, by the finding of certain issues directed to a Jury.

My Lords, the circumstances of the case are shortly these:—A Mr John Dunlop was a baker and grocer, residing in Stewarton, in the county of Ayr, where, in 1794, it appears he acquired certain property, consisting of houses and other things. The Case states, that he was engaged in trade; and having carried it on for some time with success, he afterwards, in consequence of a connexion between him and a man of the name of James Ferguson, his nephew, became involved in difficulties, which finally led to the bankruptcy of John Dunlop, whose trustee, Robert Spier, the appellant, is. In consequence of the speculations into which John Dunlop had entered with Ferguson, he became embarrassed

May 22, 1826. and he and Ferguson were obliged to endeavour to raise money. John Dunlop accordingly applied to the respondent, a Mr James Dunlop, his nephew, and who, it appears, was educated as a writer or attorney, and is a notary public, and was for a considerable time agent for the Commercial Bank at Beith, and discounted bills as a private banker in the town of Irvine. The respondent acceded to this request; and the way in which he afforded assistance to John Dunlop, his uncle, was as follows:—Ferguson drew a bill upon John Dunlop in favour of the respondent Mr James Dunlop, for £220, payable three months after date. That bill was drawn on the 6th of September 1820; and, as your Lordships will perceive, by adding three days grace, it would become due on the 9th December 1820. The bill was accepted by John Dunlop, the bankrupt; James Dunlop indorsed and discounted it with the agent for the Commercial Bank at Beith, and by means of that discount advanced the money so raised upon the bill to John Dunlop.

My Lords, presently after, Ferguson absconded, and John Dunlop became a bankrupt, but not till after the transaction to which I am about to call your Lordships' attention. It appears that John Dunlop, as I have stated to your Lordships, was possessed of houses and a piece of ground at Stewarton. It was therefore proposed, that he should convey this property to another uncle, Mr William Dunlop, who is the proprietor of a considerable estate, at the price of £600; that the £600 should be paid as the price of the property; and it appears that that transaction was accordingly completed, and no attempt has been made to set aside that sale so made by John Dunlop to Mr William Dunlop for £600. It appears that a bill to the amount of £600 was given by William Dunlop, the purchaser; that that bill was discounted, and that £220, being part of the amount of that bill, was deposited or delivered to Mr James Dunlop, the present respondent, to secure him against the consequence of the indorsation of the bill for £220, which would become due on the 9th of December. This, my Lords, took place on the 18th of October. Soon afterwards, on the 19th of October, a sequestration issued against Ferguson, and a petition was presented on the 29th of November, under the statute of 54 Geo. III. chap. 137, at the instance of a creditor for the sequestration of the estates of John Dunlop, on which sequestration was awarded on the 2d of December. It is sufficient for me to state, that the sequestration issued between the 18th of October and the 9th of December, when the acceptance of John Dunlop, the bankrupt, became due.

The appellant having been appointed trustee on the sequestrated estate of John Dunlop, raised an action against James Dunlop the respondent; and in the summons he states, &c.—(Here his Lordship read the terms of the summons and conclusions.)

My Lords, upon this case coming before the Lord Ordinary, he remitted the case to the Jury Court; and issues were directed to the following effect.—(His Lordship here read the issues.)

These issues, my Lords, were tried at Ayr, and the Jury found, 'That within sixty days of the admitted bankruptcy of the said John

'Dunlop the defender, James Dunlop did not enter into an agreement or 'concert with the said John Dunlop the bankrupt, for the purpose of ob- 'taining security or payment for £220;' and then they find, 'That the 'defender James Dunlop, by means of the said sale, did obtain from John 'Dunlop, by the hands of his wife, £220, on the said 18th October 1820, 'as a provision for payment of said bill, when it became due.' May 22, 1826.

My Lords, upon this verdict being returned, the case was sent back to the Court of Session, and came before Lord Eldin, who had by this time taken his seat on the bench as Lord Ordinary, and he pronounced an interlocutor, finding, 'That the sale and payment to the defender were an 'evasion of the act 1696, and that it would be dangerous to give legal 'effect to a transaction of this nature.'

A representation was put in by the respondent against this judgment, and it coming again before Lord Eldin, he pronounced an interlocutor, adhering to his former one, and refusing to the respondent the previous expenses which he claimed. That decision of the Lord Ordinary was brought under the consideration of the Second Division of the Court of Session, and they, in the month of December, in the same year, were pleased to pronounce this interlocutor: 'The Lords ha- 'ving considered this petition, with the answers, former proceedings, heard 'the counsel for the parties viva voce, and advised the whole cause, recall 'the interlocutors complained of, and find, that the judgment in this case 'must proceed on the verdict of the Jury alone, and appoint parties to be 'heard in presentia, on the import and effect of the verdict.' It afterwards came on again before the Court, and a majority of the Court having adopted the view of the respondent, the following judgment was pronounced: 'The Lords having again resumed the consideration of this 'petition, with the answers thereto, and in terms of the last interlocutor 'of Court, having heard counsel for the parties in their own presence, on 'the import and effect of the verdict of the Jury, and having advised the 'whole proceedings, they repel the reasons of reduction, assoilzie the 'defender from the conclusions of the libel, and decern; find the defender 'entitled to his expenses, allow an account thereof to be given in, and 'remit the same, when lodged, to the auditor of Court, to tax and to re- 'port.' It is against that judgment, my Lords, that an appeal has been brought to your Lordships' House.

My Lords, the decision of the Court of Session proceeded upon this principle, and, I apprehend, a correct principle, that the finding of the Jury was conclusive upon the issues directed to them, and that it was not competent for them to go into any consideration of facts or circumstances contrary to the finding of the Jury. Some of the learned Judges seem to have thought (and probably with a great deal of reason), that the case never should have been sent to a Jury at all, but that there was ample ground for the Court to determine the question without sending an issue to a Jury; but they admitted (and it must be admitted) that issues having been sent, the finding of the Jury is conclusive as to the facts which were so put to them. But then this question arose whether or not,

May 22, 1826. consistently with the findings of the Jury (allowing them to be conclusive as far as they go), and whether, admitting that there was no concert and agreement between James Dunlop and John Dunlop, as to the payment or the deposit of the £220 with James Dunlop; and he being at that time merely the indorser of a bill of exchange, payable at a future day, before which day John Dunlop, the accepter, became bankrupt; Whether, I say, consistently with the findings of the Jury, the voluntary deposit of that sum in his hands, for the purpose of covering the bill when it should become due; and that transaction taking place within 60 days of the bankruptcy of John Dunlop; did not (independently of any concert or agreement that might exist between James and John) vitiate the transaction under the statute 1696; or Whether it might not be considered as a voluntary payment by John Dunlop, in contemplation of his insolvency, and as such a transaction to be considered as a fraud, by the common law of Scotland; and therefore that the trustee under this sequestrated estate, for behoof of the creditors, would be entitled to recover back from James Dunlop the sum of £220, as the amount of such deposit. The Court of Session thought that the finding of the Jury was conclusive upon the question of a fraud, and therefore they could not go out of it; and were further of opinion that the interlocutor pronounced had gone out of that finding, and had gone out of the facts, contrary to what the Jury had found to be the fact, and the majority felt themselves in this situation:— They considered that the pursuer, the present appellant, had put his case upon an issue sent to the Jury, and that this being found against him, they were bound not to look to any other circumstances in the case, but that they were bound to decide against the appellant. I observe, from the papers in the proceedings below, that the respondent felt a little difficulty in his case arising from these circumstances, for he said you ought not to go into that part of the case, without first indemnifying me for the expenses of the Jury trial, because, consistently with the finding of the Jury, there was not sufficient grounds for the Court to hold that this transaction was struck at by the statute of 1696, or was reducible by the common law as a voluntary transaction between the parties. He said, that before the institution of the Jury Court, the inquiry might have been made by the Court of Session, in which, if it had found one way, it would have entitled the appellant, in this case, to a judgment in his favour;—it being admitted, that if they had found there had been a fraudulent agreement between John and James Dunlop, then the whole transaction must have been considered null and void;—and therefore, as the reverse had been found, he, the respondent, was entitled to his expenses. Upon this subject I would say, that if the first issue had been found in the affirmative instead of the negative, it alone might have entitled the appellant to judgment; but, being found in the negative, the question is, whether there is not sufficient remaining in this cause, entitling the Court to look at the transaction, in order to see whether it is not one that falls within the purview of the statute 1696, or struck at as a fraudulent preference given by the insolvent to the respondent, as a favoured creditor? The majority of the

Judges thought they could not do that; and I confess that I felt great difficulty when I came to this part of the case. It was argued at the Bar, that the issues having negatived all fraud, the Judges were precluded from going into any evidence of the subject of fraud. But supposing that fraud had entered into the consideration of the Jury, and that the Jury had negatived the fact of there being any fraudulent contrivance between the uncle and the nephew—still is there not a question to be considered, whether (independently of that fact) this is not a sort of transaction struck at by the statute of 1696, or as a voluntary payment on the part of this person to an individual not an actual creditor, though so stated in the summons; and indeed he was so in this sense, having advanced the sum of £220, which had been received by discounting of the bill in question. But then supposing that he is to be considered as a creditor or cautioner on the bill, which did not become due till the 9th of December, a period following this transaction, are these not questions to be considered in this case, notwithstanding the finding of the Jury, viz.—whether this transaction can stand, reference being had to the statute of 1696;—or to the circumstance of its being a voluntary payment, in contemplation of insolvency? May 22, 1826.

My Lords, if the finding of the Jury had been conclusive with respect to that view of the case, I should have agreed that the opinion pronounced by the learned Judges in the Court below was correct; that their eyes were shut to the consideration of the question; and that they could not go out of the finding of the Jury; but it does appear to me, that it may deserve grave consideration on the part of the Court, whether, consistently with those findings, those questions I have mentioned are not still open. I have cautiously abstained at this moment from giving any opinion upon those questions, because it is due to the Court of Session, in my view of the case, that they should have an opportunity of first considering them; and I think your Lordships ought not to decide upon them (supposing your opinion should be to reverse the interlocutor complained of) upon that view of the case. I think it would not be fit, or proper, or respectful to the Court of Session, to decide those questions, and to reverse their interlocutor, before they had an opportunity of considering those questions—questions certainly of Scotch law, and one of them upon a Scotch act of Parliament; and therefore I think your Lordships ought to have the benefit of their decision before you are called upon to decide those questions.

The sum, my Lords, which is in dispute in this case, is not large—it is only £220—but the question is one of very great importance. It appears to me, that I might venture to propose to your Lordships a judgment which will show the Court of Session that you concur with them in opinion that nothing ought to be done in this case which shall be at variance with the finding of the Jury, but leaving it to them to consider whether, consistently with those findings, the payment made by Mr John Dunlop to James, under all the circumstances, was not reducible, so as to entitle the appellant to recover that money back again.

May 22, 1826. My Lords, the language of the judgment should be penned in a way that will require more consideration than I have yet given to it; but I apprehend that you will be of opinion that it will be proper to remit this cause back to the Court of Session to review the interlocutors complained of, and to consider whether, consistently with the findings of the Jury, the transaction of the payment of this money, according to the language of the summons, was or was not reducible according to the common law, or under the statute 1696—leaving the questions entirely open, first, the one which arises upon the statute; and, secondly, the ulterior question, supposing it not struck at by the statute, whether it is not reducible on the ground of being a voluntary payment in the contemplation of bankruptcy. That is the nature of the judgment which I shall ask your Lordships to pronounce.

Perhaps, my Lords, it will be better to adjourn this case till Monday, that I may be quite sure that the language of your Lordships' remit is consistent with the views I have taken of it, meaning to recommend your Lordships to leave the questions quite open, which I apprehend would be considered to arise upon the statute and the common law, with reference to the finding of the Jury, taking that finding as conclusive of the facts found by them, Whether, consistently with these facts, the transaction may not be reduced under the statute, or by the common law, on the ground of its being a voluntary payment in contemplation of bankruptcy.

Appellant's Authorities.—55 Geo. III. c. 42, § 8—Duff *v.* Fife, July 17, 1823, (Ho. of Lords,)—2 Bell, 222. 243.—1621. c. 18.—Moncrieff, February 8, 1694. (1054)—Creditors of Carlowrie, Jan. 15, 1695. (4930)—Bradley, April 26, 1793, 5 Term. Rep. 202.—2 Bell, 227.—M'Math, March 1, 1791. (Bell, Cases, 22)—Forbes, January 27, 1715. (1124.)—Smith, July 19, 1728. (1128.)—Young, June 25, 1723. (1141.)—Durward, Feb. 2, 1760. (1119.)—Campbell, Jan. 16, 1713. (1120.)—Manson, July 16, 1671. (App. No. 7, voce Bankrupt.)—Brown, July 6, 1764. (886.)—Marshall's Trustee, Jan. 21, 1794. (1144.)—Young, July 9, 1736. (Elchies, No. 7, voce Bankrupt.)—Crawford, Nov. 16, 1752. (ibid. No. 28.)—Blaikie, May 9, 1781. (887.)—4 Ersk. 1. 43.—Barbour, May 30, 1823.—2 Shaw and Dunlop, No. 335.—1 Bank. p. 272, 116—Vernon, 2 Term. Rep. 648—Tamplin, 2 Camp. Rep. 312.—2 Bell, 230—Buchanan, Jan. 25, 1733, (1128.)—Forbes, 26, 1751. (1129.)—Bean, Aug. 1, 1760. (907.)—Ferrier, June 2, 1808. (2 Bell's Com. 229.)

Respondent's Authorities.—4 Ersk. 1. 41. 44.—2 Bell, p. 225. 255. 257.—1696. c. 5.—Elchies voce Bankrupt, No. 26.—Durward, Feb. 2, 1706. (1119.) Campbell, Jan. 16, 1713. (1120.)—Buchanan, Jan. 25, 1733. (1125.)—Forbes, Jan. 26, 1751. (Kilk. and 1042)—Bean, Aug. 1, 1760 (907.)—1 Ersk. 3. 63.—Elchies voce Bankrupt, No. 26.

A. MUNDELL—J. RICHARDSON—Solicitors.

DUKE OF QUEENSBERRY'S TRUSTEES, Appellants.—*Murray—Abercrombie.* No. 23.

MARQUIS OF QUEENSBERRY, Respondent.—*Brougham—Keay—Sandford.*

Tailzie.—Reparation.—The Court of Session having held that an action concluding for damages at the instance of an heir of entail in possession, was competent against the executors of the preceding heir, who possessed under an unrecorded entail in favour of a series of substitutes, containing prohibitive, irritant, and resolutive clauses; and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail being the heir's forfeiture, and nullity of the act itself, and not pecuniary damages; the House of Lords remitted for the opinion of both Divisions.

May 22, 1826.

1ST DIVISION. Lord Meadowbank.

By the Tinwald entail, executed in 1769, by Charles Duke of Queensberry, in favour of a series of substitutes, it is provided, 'that it should not be lawful to any of the said heirs to set tacks 'or rentals of the said lands, or any part thereof, for any longer 'space than 19 years, and without any diminution of the rental, 'or for the setter's lifetime, in case of any diminution of the 'rental; and that it shall not be lawful to any of the said heirs to 'take grassum for any tack or rental to be set by them, but to set 'the said lands and estate at such reasonable rents as can be got 'therefor, so that the succeeding heirs may not be hurt or pre-'judged by the heir in possession setting the lands at an under 'value, or taking by way of grassum what falls annually to be 'paid out of the produce of the lands.'

The consequences of contravention are declared to be, that any of the heirs contravening 'shall for himself or herself only 'ipso facto amit, lose, and forfeit all right, title, or interest 'which they respectively have, or shall have, to our said lands 'and estate; and the same shall become void and extinct, and 'the lands and estate shall devolve, accrue, and belong to the 'next heir of tailzie appointed to succeed, in the same manner 'as if the contravener was naturally dead;' that the lands and estate should not be burdened with the acts and deeds of contravention, which it is declared should have no force, strength, or effect against the other heirs of entail; that both the estate and heirs should be as free therefrom, as if the deeds of contravention had never been done or happened; and that it should be lawful to the heir having a title through the contravention of a former heir, to establish in his or her person the right and title to the said estate, without being subjected to the deeds of the party contra-

May 22, 1826. vening. Although there was a power given to record the entail, there was no injunction to that effect.

On the death of Duke Charles the entailer, he was succeeded by William Duke of Queensberry, who made up titles to the estate under the entail, but he did not record it. During the period of his possession, he obtained renunciations of several of the current leases, and granted new ones; and on his death the Marquis of Queensberry, who succeeded him, being advised that a reduction of these new leases was not competent, as the entail had not been recorded, raised an action of damages against the Duke's trustees and executors, on the ground of contravention, by having entered into these transactions with a view to enrich himself, and thereby to injure the succeeding heirs; and that he had done so in a manner contrary to the entail, and in order to defraud the next heir. In defence against this action, it was pleaded as to one class of the leases, that as the period for which the original leases were granted was still current, and as the new leases had been granted on renunciations for rents which were at least the same as in the original leases, the pursuer could not qualify any damage. The Court of Session, on the 22d of February 1815, assoilzied; and on appeal, the House of Lords, on the 26th May 1820, affirmed the interlocutors complained of, 'so 'far as they respect leases granted by William Duke of Queens-'berry on the renunciation of former leases, which, if not sur-'rendered, would have been subsisting leases at the time the 'summons was issued, without prejudice to any action or ac-'tions to be hereafter brought on account of the said leases.' 'And with respect to the rest of the leases to which the interlo-'cutors relate, that the cause be remitted back to the Court of 'Session in Scotland, to review the said interlocutors, with liber-'ty to the appellant to give in an additional condescendence, and 'in such additional condescendence to state such farther facts 'and circumstances as he may be advised to state, with respect to 'each of such last mentioned leases respectively, provided such 'farther facts and circumstances be consistent with the terms of 'the summons, and warranted thereby.'

The effect of this judgment was to assoilzie the trustees and executors from the action of damages as to the leases granted on renunciations of former leases, the period of which was still unexpired, but without prejudice to any other action of damages to be afterwards brought in relation to them. Among this class was the lease of the farm of Old Mains of Tinwald, and on its expiry the Marquis of Queensberry raised an action of damages against the trustees and executors, stating

generally, that while the Duke 'was in possession of the 'estates to which he succeeded under the disposition and deed 'of tailzie aforesaid, he let the whole or most of the farms 'upon the estate, not at such reasonable rents as could have 'been obtained therefor, but, on the contrary, he, with an in-'tent to defraud the succeeding heir, let them at rents far be-'low such reasonable rents; and thus the said Marquis, pur-'suer, had been hurt and prejudiced by the said Duke while 'in possession, his setting the lands at an undervalue;' that in particular, the farm of the Old Mains of Tinwald, which was possessed on a lease of nineteen years, from Whitsunday 1791, at the yearly rent of £140, had been renounced in 1796, and a new lease, for nineteen years, granted from Whitsunday of that year at the same rent; and again in 1799, a new lease had been made, also for 19 years, at a rent of £140, both of which leases were 'in defraud of the said Marquis, pursuer, greatly to his hurt 'and prejudice, and in contravention of the said entail,'—£140 not being such a reasonable rent as could have been got for the farm, which was well worth £550 per annum, and of which the Duke was well aware. May 22, 1828.

Among other defences, the trustees pleaded that the action was incompetent, seeing that the only penalties which the deed of entail annexed to any act of contravention, was the forfeiture of the heir contravening, and the nullity of the act itself; and there was no condition or declaration whatever importing that the representatives of any heir who should possess the estate should be liable in damages to a succeeding heir on account of any alleged act of contravention.

The Lord Ordinary having reported the case on informations, the Court of Session, on the 15th December 1825, found the action competent, repelled the defence, and remitted to the Lord Ordinary to proceed accordingly.*

Lord President.—We have in a manner decided this case already, for it seems to be the case of Ascog over again.†

Lord Hermand.—I have no doubt of the competency of an action of damages against the executors. This was the only course left to the pursuer. If the entail had been quite perfect, I am not prepared to say that such an action would have been competent. But the entail was imperfect from the want of re-

* See 4 Shaw and Dunlop, No. 228.

† The decision in the case of Ascog is not yet final, a reclaiming petition having been appointed to be answered.

May 22, 1826.

gistration; and the proper remedy in case of contravention has thus been neglected to be provided.

Lord President.—That is very true. But the heir in possession was just as much to blame for not getting the entail recorded, as any one of the other heirs. The late Duke was quite as much in fault as the Marquis.

Lord Balgray.—In my opinion he was more so; for it was the primary and special duty of the heir in possession to have the entail completed, by putting it on record, upon his first taking possession under the entail. The consequence of the neglect in this case has been, to save the lease, but not to protect the executors from damages. The present action is perfectly competent. But I will go farther, and suppose the entail to have been perfected by recording. Still I have great doubts whether the pursuer might not have had other remedies besides that of irritancy, and particularly whether he might not have had a competent action of damages against the executors, if that had been necessary. And I will not say that one of these remedies would exclude the other; for I think the pursuer might be entitled to them both at one and the same time. The object of the entailer is to preserve his estate; and this he endeavours to accomplish by fettering the heir in the mode of conducting it. He may even restrain him in the ordinary management of the estate, and the restraint will be effectual. The heir must act according to the injunctions of the entail. He is not entitled to reap any advantage to himself at the expense of the other heirs, in any manner which is prohibited by the entail: and if he does so, he is liable to them in damages for the loss, besides forfeiting his right on account of contravention of the entail. He is bound to repair the wrong which he has done to the heirs: he is bound to refund to them the money which he may have pocketed by taxing the rentals. I say therefore, that not only is his right to the estate resolved by the act of contravention, but he is at the same time personally bound to repair the damage, by giving up what truly belongs to the heir of entail. I have no doubt that this personal obligation may be made good against his representatives. The House of Lords were undoubtedly of opinion that such a claim is relevant, else they would not have sent the original action back here. Indeed I think the law of the case perfectly clear. If an heir of entail, in the face of a prohibition, does a great injury to an estate, is he not bound to repair it? Suppose, as in the case of Allan, that he has pulled down the house and sold the materials, no doubt his right would be forfeited, but at the same time would he be entitled to pocket the proceeds, and to

retain them, because the next heir was not entitled to sue for them? Impossible. Or if he had set fire to the house and burned it, would he not have been liable to the next heir in damages as well as have lost his right to the estate, if that had been the penalty of contravention? These consequences would no doubt be dependent upon the nature of the prohibition in the entail. But in the present case the prohibitions of the entail are expressly declared; and if the pursuer can only prove that the alleged injury and violation have been made, I have no doubt that he is entitled to sue the executors for damages, though I suspect he may find it perhaps a difficult matter to prove the facts. The House of Lords, indeed, have decided on the relevancy of the action by their remit; and they appear to have sent back the case only for the purpose of having the facts ascertained. May 22, 1838.

Lord Gillies.—The question here is as to the competency of the action, and we must assume, as the defenders have done in stating their additional defence, that an act of contravention has taken place. I think the decision in the Ascog case must be taken as the rule in this. At the same time, I was one of those who doubted of the correctness of that decision. The present case, indeed, is infinitely stronger in favour of the pursuer. For here there was a perfect entail; and the heir is not entitled to plead upon any imperfection that arose from the want of registration, for then he would be founding on his own wrong. If the Duke had been still living, the pursuer might have brought a declarator of irritancy; but as he is now dead, the only remedy remaining is an action of damages against his executors. I have no doubt as to the competency of the action.

Lord Craigie.—I think the action ought to be sustained. A deed of entail is a sort of contract amongst all the heirs, by which each of the heirs in possession is bound as a bonus paterfamilias to all the rest. Therefore, if the pursuer's allegations be true, as to the views on which the late Duke proceeded in fixing the rents, it is as clear as sunshine that the Duke is as liable to challenge on account of these leases as if he had taken grassums directly. If he accepted of £140 rent when the farm was worth £550, the next heir was injured as a necessary consequence, if the lease did not expire at the time of the Duke's death; and he was therefore entitled to a remedy. The present claim of damages is unquestionably competent.

The trustees appealed.

Appellants.—The entail not having been recorded when the

May 22, 1826. leases were let, the claim for damages cannot be founded on the statute 1685; neither has it support from the irritant and resolutive clauses; and the mere injunction to let at reasonable rents, even if it could operate independently of the irritant and resolutive clauses, cannot be a ground for damages. The statute gives no countenance to the distinction, that although the form it prescribes must be adopted to impose fetters in a question with creditors and third parties, still an effectual obligation can be laid on the heirs themselves, by a simple prohibition. If so, then as a prohibition derives its efficacy from the resolutive and irritant clauses, and these produce their effect by voiding the deeds of contravention, and forfeiting the right of the contravener, an action of damages is incompetent. But even if, independently of statute, the heirs could be fettered, still a simple prohibition, unaccompanied by any declaration by the entailer, of what is to be the consequence of transgression, will not afford a substitute-heir ground for a claim of damages; for it is now established law, that even in questions inter heredes, no implication, however clear, can be admitted, in order to impose restraints on the heir in possession. Nor is there any room for the distinction, that the rule of strict interpretation applies only in ascertaining, whether there is a prohibition or not; and not to the inquiry, what are the consequences of infringing the prohibition? Besides, if a simple prohibition created an effectual obligation on the heirs of entail, it would vest the substitutes with a perfect and complete jus crediti; but this jus crediti, the substitutes do not enjoy; for if it existed, it would be protected by the ordinary remedies of inhibition or interdict, which it is not. At all events, there can be no ground for a claim of damages under an entail constructed in terms of the statute 1685, where the maker of the entail has distinctly specified what are to be the consequences of contravention. If so, the claim cannot arise from the circumstance, that at the date of the leases, the deed was not recorded. Neither does the claim result from any neglect or failure of duty imputable to the Duke; for there exists in the entail no injunction on the heirs to record; but the entail merely puts it in their power to do so.

Respondent.—The appellants' doctrine is founded on the erroneous assumption, that the irritant and resolutive clauses of the entail contain the only penalties annexed by the entailer to the deed of contravention, and that consequently a demand for damages is unwarranted. Nothing is more clearly established in the law of Scotland, than that in questions inter heredes, the obligations created arise not vi statuti, but from the principles

of common law. In such a question, the heir, by acceptance of the estate under the conditions imposed by the disponer, obliges himself to perform these conditions. If the condition amounts to an obligation in favour of a third party, then that third party acquires a jus crediti to enforce implement of the condition. Before the statute 1685, entails containing prohibitions were obligatory on heirs taking under them, and were not rendered less so by the passing of the act. A jus crediti, corresponding to the condition or restriction, is vested in the substitutes, and entitles them to claim reparation of any damage arising from contravention. It is of no importance (the question being inter heredes) that the entail was not recorded; it still remained effective against heirs, and created valid obligations, which they were bound to obey, if they accepted. And this rule is equally applicable to an unrecorded deed of entail perfect in the irritant and resolutive clauses, as it is to an entail where they are imperfect. The penalty stipulated by these clauses is not exclusive of damages resulting from the infringement of the prohibition. The principle that must regulate the present case, was enforced in the case of Stewart of Ascog, 28th June 1825, after a hearing in presence of the whole Court. May 22, 1826.

LORD CHANCELLOR.—It appears there is no former case in which an action of the same nature as this one has been brought. Now as such actions may be brought before the lease has expired, and there may be a succession of heirs during that period, I wish to be informed, whether, if A, B, C, and D, were successive heirs of entail during the currency of the lease, which may be said to have occasioned damage to each of these successive heirs of entail, do you maintain that each of these heirs may bring upon their succession separate actions of damages, for the periods during which they possessed the estate?

I wish also to know, whether the situation of heirs and executors, who may be exposed to such claims, was considered by the Court; and in what manner the estate could be administered with reference to them. Put the case, that such a lease endured for nineteen years. Suppose,—what may not be according to the ordinary longevity of heirs of entail,—that there were nineteen successive heirs of entail during the currency of the lease:—Are each of those heirs entitled to bring a separate action of damages against the representatives or executors of the heir who let the leases? The funds belonging to the representatives may not be equal to meet all such actions. Were the represen-

May 22, 1826. tatives bound to pay them all over to the first heir who brought an action? Or, were they to reserve them for the nineteen years? Or, how were they to administer the succession?

Respondents.—We certainly contend that every heir of entail who succeeds to the entailed estate, during the currency of a lease such as the present, is entitled to be indemnified by the representatives of the contravener, for the loss sustained by him in consequence of the contravention. And if the conclusions in the action brought by the first heir are not sufficient to include the claims of all succeeding heirs,—or if the representatives of the contravener are not willing to settle upon the principle established by the judgment pronounced in it, a separate action may be necessary at the instance of each heir succeeding. It may also happen, that the funds of the executors are not sufficient to meet all the claims, and, in such a case, the first heir would undoubtedly be in a more fortunate situation than those coming after; but this is merely the case of a wrong doer not leaving property sufficient to pay the damages due to the injured party. This can never touch the principle of the question, whether damages are due or not.

Lord Chancellor.—So in this way the first heir may carry away the whole, and leave nothing for those who succeed after him. I find great difficulty in collecting what was the notion of the Court of Session, how this judgment is to be executed in damages. It will not do to say, that the lease is out when the action is brought, because the very principle upon which you are to say that damages may be given in that case, must make you go the length of saying also, that if the lease had not been out, damages must have been given in that case: Then, how are the damages to be estimated as due to A, B, C, D, and E, every one of whom has a right to say, this lease has affected me in my interest in such a manner, that I also have a right to damages? If the Court of Session meant to determine, that if a case happened where five or six persons might come into esse during the period for which the lease had been granted, each and every of them from time to time had an action,—that is a very important point to decide; but I cannot find that that was at all adverted to in the judgment.

Besides, I observe the summons states the late Duke to have made this lease in defraud of those entitled after him; but it does not state any sort of advantage he got himself. Nor is it even

alleged in the summons, that he, in any shape or form, got more than £140 a-year; there is no allegation of that sort in the summons. May 22, 1828.

The House of Lords ordered, 'that the said cause be remitted 'back to the First Division of the Court of Session in Scotland, 'to review the interlocutor complained of, having in such review 'regard (among other considerations) to the consideration how 'damages are to be estimated, which are claimed by an heir 'succeeding to an estate, on account of a lease or tack subsisting at the time of his succeeding to the estate having been 'made at an undervalue in point of rent, and which lease or 'tack such heir cannot according to law reduce; and with respect to which lease or tack, it is uncertain at the time of 'the commencement of his suit, and at the time of pronouncing 'judgment therein, during what period of the endurance of the 'tack he may live, or his right to the estate may continue; and 'also to the consideration, whether, if such tack shall endure 'during a period in which several heirs entitled to succeed, shall 'succeed to the estate, it is competent to each of them so succeeding, to institute and maintain, upon their respectively succeeding, a like action or suit for damages on the like account; 'and how the damages are to be estimated in the respective actions or suits, which suit such heirs respectively shall so institute; and it is further ordered, that the Court to which this 'remit is made, do require the opinions of the Judges of the 'other Division in the matters and questions of law in this case 'in writing, which Judges of the other Division are so to give 'and communicate the same.'

LORD CHANCELLOR.—My Lords, in this extremely important case, I understand the Judges to have been unanimously of opinion, that this action can be maintained; it becomes therefore any person who has the honour of addressing your Lordships, if he should venture to express an opinion that the action cannot be maintained, to be quite sure that he is on safe ground, and on safe Scotch ground. There is one difficulty I have, to which I can get no answer at present, and which does not appear to have been at all considered by the learned Judges in Scotland. In the present case, it is held, that there is a right to damages in the individual who is the pursuer; but in order to determine whether an action for damages will lie, we must look to the case where a person in possession under an unrecorded entail makes leases of a duration, as we know they have been made, which may run to a considerable length, so as to pass through, not only the period in which the next person would be entitled to enjoy the estate, but which may pass through those periods

May 23, 1826. in which successive substitutes may succeed to the estate. If an action for damages will lie for him who is the heir who succeeds next, it may seem an action for damages must always lie, upon the same principle, at the suit and instance of every person whose enjoyment would be prejudiced by the lease; and what I want, therefore, to know is, how the judgment of the Court could be executed in such a case as that; for I cannot conceive that one is acting very properly in expressing a judgment as to which one does not know how it is to be executed. What I wish therefore to know is, if anything has passed in the Court below pointing out in what manner the Judges held, in the case I have supposed, that this sort of judgment could be executed. Did they mean to say, that if there were ten persons, for instance, coming into existence during the currency of the tack, each and every of them, when his title to the estate commenced, had a right to bring a fresh action; and, if so, how is the damage to be estimated ab ante with respect to each of them, when it is impossible to know how long each or any of them might continue to enjoy the estate? Whether that information can be communicated to me in any way, without resorting to the Judges themselves, I do not know. If it could, I should be extremely glad to have it. If it cannot, I protest I do not know what to do in this cause; for I do not know how such a judgment in the case I have put could be executed; and if, in the case put, it would be difficult to say how it could be executed, the simplicity with which it can be executed in the case of a single individual, is no answer in such a case as I have stated.

My Lords, I am extremely unwilling to do that which was somewhat my practice, I mean in difficult cases, to remit the consideration to the Court of Session in Scotland, because I have heard enough upon that; and yet I think it but justice to myself to say, that I was informed by no less a person than my Lord Thurlow, that if I ever wanted any information of that sort from Scotland, there was no getting it but by making a remit. That led to a practice of which there has been some complaint, and which practice has not lately been persevered in. If, therefore, this information can be given me in any other way, I shall be very glad, for the sake of all parties, to have it given in any other way; if it cannot be given in any other way, I must in that way have it given, before I know how to advise this House.

LORD CHANCELLOR.—My Lords, there is a case, an extremely important one, which stands for your Lordships' judgment, in which damages are sought against the representatives of the late Duke of Queensberry, in respect of a lease or tack he had made of a property at the rent of £140 a-year, and which lease or tack, the entail not being recorded, cannot be set aside.

The summons in this case on behalf of the present Marquis of Queensberry, calls on those in possession of the property of the late Duke of Queensberry, to make satisfaction for the difference between the rent

reserved under the tack, and the value of the property if it had been let in the ordinary course; the object of the suit being, in some way to make good to the present heir, who has now succeeded to Old Mains of Tinwald, as they call it, the loss that he sustains by having a lease granted of this estate at an under-value. It will occur, I think, to one noble and learned Lord who hears me, that, upon a former occasion, there was a good deal of consideration in this case, how far this could be sustained. May 12, 1808.

There has been a case before one Division of the Court of Session, the case of Ascog, in which they have held, that where there has been an entail which was not effectual against purchasers, and where, therefore, the party coming into possession of the estate was not able to set aside the sale, he was entitled to have the price, which he ought to have received, invested in lands for his benefit; and your Lordships see it is an operation very easily managed: it is declared, that they are to be settled for the benefit of all concerned and interested in the entail. That case, I believe, has not yet found its way to this House; but it has been supposed in the Court of Session that that case determines this case. Now, with reference to what passed on the former proceedings, and with reference to the difference between that case and this, it does appear to me, on the best consideration I can give it, that this case must be remitted back again to that Division of the Court of Session before whom it was heard, desiring them to take the opinion of the Judges of the other Division; and particularly, to pay attention to the circumstances which I will take the liberty to propose to your Lordships to insert in the judgment.

I think, my Lords, the order of your Lordships might be thus expressed:—'That the said cause be remitted back to the First Division of the 'Court of Session in Scotland, to review the interlocutor complained of, 'having, in such review, regard, among other considerations, to the con-'sideration, how damages are to be estimated;'—Before I read the rest of this, I will take the liberty of mentioning to your Lordships, that I have repeatedly inquired whether this consideration I am now about to mention, had been observed or attended to in the course of the arguments or judgment in the Court below, and how it was dealt with; and the answer they gave me upon the first part of the inquiry, was, that they did not remember that this had been thought of; and the answer to the other consideration was, by gentlemen who attended the Court below, that they were not able to give any precise information upon the subject;—'having, in such review, regard, among other considerations, to 'the consideration, how damages are to be estimated which are claimed 'by an heir succeeding to an estate, on account of a lease or tack subsisting at the time of his succeeding to the estate, having been made at 'an under-value in point of rent, and which lease or tack such heir cannot, according to law, reduce; and with respect to which lease or tack, 'it is uncertain at the time of the commencement of his suit, and at the 'time of pronouncing judgment therein, during what period of the endurance of the tack he may live, or his right to the estate may continue;

May 22, 1826. 'and also to the consideration, whether, if such a tack shall endure during 'a period in which several heirs entitled to succeed shall succeed to the 'estate, it is competent to each of them so succeeding, to institute and 'maintain, upon their respectively succeeding, a like action or suit for 'damages on the like account, and how the damages are to be estimated 'in the respective actions or suits which such heirs respectively shall so 'institute.' In estimating how the difference in value is to be compensated, it is obviously necessary to consider, as it appears to me, whether, if the first heir succeeds to this estate, his damages must not be regulated by the time he is in possession of the estate, and so in respect to the heirs succeeding after him, each of them may be prejudiced as well as the first; and therefore we ought to know, in order to ascertain whether the judgment is right, by what rule of estimating, according to the law of Scotland, the damages would be apportioned in the case of each heir. If your Lordships see no objection to that mode of proceeding, it does appear to me, that it would be proper that both Divisions of the Court should be consulted upon this.

LORD REDESDALE.—I cannot see how this judgment can be executed.

LORD CHANCELLOR.—That is my conviction. It may happen when the next heir having a title to the estate succeeds, that he may not live even one year; what is the rule by which the damages are to be estimated? and in forming one's opinion whether the judgment of the Court can stand, surely one ought to see how it can be carried into effect; and with that view I take the liberty of submitting to your Lordships that which I have now read as the judgment of your Lordships, to remit the cause, with a special direction to take the opinion of both Divisions of the Court upon the question.

Appellants' Authorities.—Willison, Feb. 26, 1724. (15369.)—Strathaven, Feb. 2, 1728. (15373.)—Cuming, July 29, 1761. (15513.)—Erskine, Feb. 14, 1758. (15461.)—Gordon, July 8, 1777. (15462.)—Menzies, June 25, 1785. (15436.)—Wellwood, May 31, 1797. (15466.)—Miller, Feb. 12, 1799. (15471.)—Steele, May 12, 1814. (F. C.)—Stewart, July 8, 1789. (15535.)—Brown, May 25, 1808. (App. I. Tailzie.)—Henderson, Nov. 21, 1815. (F. C.)—3 Ersk. 8. 23.—Bryson, Jan. 22, 1760. (15511.)—Lord Ankerville, Aug. 8, 1787. (7010.)—Lockhart, June 11, 1811. (F. C.)—Bruce, Jan. 15, 1799. (15539.)

Respondent's Authorities.—Dal. on Feudal Property, p. 139.—Hope's Minor Practicks, tit. 16. § 9. 11. 13.—Mackenzie, vol. II. p. 490.—Bryson, Jan. 22, 1760. (15511.)—2 Stair, 3. 59.—3 Mack. Inst. 8. 17.—Treatise on Tailzies, v. II. p. 489.—Gibson, Nov. 24, 1795. (Bell's Cases.)—M'Nair, May 18, 1791. (Bell's Cases.)—Annotations on Stair, p. 110. 114.—3 Ersk. 8. 23. 27.—2 Bank. 3. 139.—Willison, Feb. 26, 1724. (15369.)—Hall, Feb. 1726. (Fol. Dict. v. II. p. 436.)—Gordon, Nov. 21, 1753. (10258.)—1 Stair, 3. 3.—3. Ersk. 3. 86.—Strathnaven, Feb. 2, 1728, (15373), affirmed, H. of Lords, Feb. 25, 1730. (Craigie and Stewart's Reports.)—Cuming, July 29, 1762. (15513.)—Young, Nov. 13, 1761. (Brown's Supp.)—Sutherland, Feb. 6, 1801. (App. voce Tailzie.)—Lockhart, June 11, 1811. (F. C.)—Lord Breadalbane, June 12, 1812. (F. C.)

J. CHALMER—J. CAMPBELL, Solicitors.

BOWMAN FLEMING, Appellant.—*Robertson—Connel.* No. 24.

JOHN THOMSON, Agent for Royal Bank of Scotland, Respondent.—*Keay—Jno. Campbell.*

Cautioner.—A creditor having obtained, in security of a loan of money, a disposition to heritable property, containing an obligation to infeft only a me, on which sasine was taken; and having got also bills by cautioners in corroboration of, but without prejudice to the heritable security; and it being stipulated that the creditor should convey the property to the cautioners, in the event of their being obliged to pay the debt; and the creditor having neglected to get a confirmation of the sasine, whereby the property was carried off by another party,—Held (reversing the judgment of the Court of Session) that one of the cautioners, who was sued for payment of his bill, was by this neglect discharged.

May 23, 1826.

1ST DIVISION.
Lord Eldin.

THE affairs of William Harley and Co. manufacturers in Glasgow (of which William Harley was the sole partner), having become embarrassed, an agreement was entered into with their creditors, by which they bound themselves to pay a composition of 8s. 9d. per pound, by four different instalments, at 6, 12, 18, and 30 months; and in security thereof, Harley conveyed his estates, real and personal, to Messrs Cook and Cuthel, as trustees, for behoof of the creditors.

When the second instalment fell due, it became necessary to negotiate a loan; and the branch of the Royal Bank of Scotland, at Glasgow, agreed to advance £7990, in consideration of a conveyance by Harley and his trustees, of his heritable property in security, and bills at twelve months date by other parties, as guarantees each for a limited amount, among whom was Bowman Fleming for £500, to the extent in all of £6500, and Harley granting his own acceptance for the balance, being £1490. A conveyance to Thomson, as cashier for the Bank, was accordingly executed in April 1817, ex facie absolute and irredeemable; but it was qualified by a back bond, in which it was stated, 'that it was a condition on which the foresaid 'sum of money was agreed to be advanced by the said Bank, 'that bills to the extent of £6500 Sterling of the foresaid sums, 'should at the time be deposited with the Bank, to be held as 'corroborative securities of the sum advanced as aforesaid, the 'one without prejudice of the other, with full power to operate 'on the personal obligations created by the said bills, by horning, caption, adjudication, or otherwise, without hurt or prejudice of the heritable security created by the said disposition; 'and the following bills have accordingly been granted and delivered to me as cashier aforesaid, all of which are dated the '23d day of April current, payable twelve months after date,

May 23, 1826. 'accepted respectively by the said William Harley, and drawn 'and indorsed by the following persons,'—(Here followed the names of the parties, including Bowman Fleming), 'amounting 'the said bills to £6500 sterling; and the said William Harley 'also delivered to me his own bill or promissory-note for £1490 'Sterling, payable 12 months after date, making in whole the 'said sum of £7990 Sterling; which said bills I oblige myself 'and my foresaids to renew to and in favour of the drawers and 'acceptors thereof, and of such other persons as may, with my 'approbation, be substituted in their place, until the term of 'Whitsunday 1822, under the usual discount. And considering 'that, although by the foresaid disposition, the lands, buildings, 'and other erections, conveyed as aforesaid, are absolutely and 'irredeemably disponed to me and my foresaids, as above express-'ed; yet the truth is, that the same, as well as the bills above 'enumerated, were granted, and are to be held by me and my 'foresaids, in security to the said Bank (and to the said respec-'tive drawers of the said bills, or such of them as shall become 'under advance in consequence thereof, according to the several 'rights and interests of the said Bank and them; but which 'right and interest of the said drawers and indorsers shall never 'stand in competition with the interest of the said Bank) of the 'repayment of the foresaid sum of £7990 sterling, with interest 'and other sums after specified. Therefore, I do hereby acknow-'ledge and declare, that I and my foresaids do and shall hold 'the foresaid several subjects, and also the foresaid bills, in se-'curity only as aforesaid, of the repayment of the foresaid sum 'of £7990 sterling, and of all interest, expense of repairs, 'insurance against loss by fire, and any other expenses I or my 'foresaids may disburse in the premises, in the event of the 'same not being done by the said William Harley, or his fore-'saids, expenses and damages, which may be incurred by the 'said Royal Bank, or by the drawers of the said bills, or any of 'them; and I the said John Thomson bind and oblige myself 'and my foresaids, upon the sum of £7990 being paid, and the 'granters of the said bills being relieved thereof as aforesaid, 'with all interest, damage, and expenses that may arise thereon, 'in the event of the same being done prior to the sale after-'mentioned, to grant, execute, and deliver all writs necessary 'for divesting me and my foresaids of, and investing the draw-'ers of the said bills, or such of them as may be in advance 'with the said several subjects; or in the event of their being 'wholly relieved, then to convey the same in favour of the said 'William Harley, and his heirs and successors, or to the said

'trustees for his creditors, in the most ample and formal man- May 23, 1826.
'ner, but at their own expense. But it is expressly provided
'and declared, that in case the whole or any part of the said
'sums, principal, interest, and expenses, shall remain unpaid,
'either to the said Bank, or any of the drawers of the said bills,
'at the term of Whitsunday 1822, the clause or power of re-
'demption and obligation on me to convey as above written, shall
'ipso facto become void and null; and in the same event, I and
'my foresaids shall then hold the same subjects absolutely and
'irredeemably, and have full power and authority without far-
'ther delay, and without the consent of the granters of the said
'disposition, or the drawers of the said bills, or their heirs or
'successors, and without any process of law whatever, to sell
'and dispose of the foresaid subjects, or any parts or lots there-
'of, which I or my foresaids may think proper absolutely and
'irredeemably, by public roup, in Glasgow, &c. and apply the
'proceeds, after deducting the expenses of the sale, in payment
'of the foresaid sum of £7990 Sterling, or such part thereof as
'may be due at the time, with the interest thereof, and other
'sums before mentioned, either to the said Bank, or to any of
'the drawers of the said bills, according to the sums they shall
'be respectively in advance at the time; and, lastly, account for,
'and pay the remainder, if any be due, to the drawers of the
'said bills, or any of them who may be in advance as aforesaid;
'and to the said William Harley or his foresaids, or to the said
'trustees for his creditors, according to their respective rights
'and interests; declaring, that in the event of the drawers of the
'said bills, or any of them, being actually in advance previous
'to a sale taking place as aforesaid, such persons so in advance
'shall have a right to be consulted in the letting and selling of
'the property, but not to impede or obstruct the same.' It
was also provided, that 'in the event of the said William
'Harley being made bankrupt, or of his sickness or death, or
'ceasing to attend to the management of the establishment car-
'ried on in the premises; or in the event of the death, bankrupt-
'cy, or other contingency, rendering any one or more of the
'drawers of the said bills unable to pay the amount for which
'he shall be bound; and of no other obligant being immediately
'substituted by the said William Harley in place of such drawer
'or drawers, it shall be in the power of me, or of my said suc-
'cessors in office, or our assignees, with consent of the drawers
'of the bills, if the property be sold in lots, to bring the said
'subjects to sale, as above mentioned, at any period three months
'after either of the above events may take place, and to apply

May 23, 1826. 'the proceeds thereof in manner above expressed, anything 'herein contained to the contrary notwithstanding.'

The subjects which were so conveyed to the Bank were held feu of Mr Campbell of Blytheswood, under an express prohibition against sub-infeudation, and a declaration that no disposition should be granted, under the penalty of irritancy, except on condition of being held directly of him. Accordingly, in the disposition granted to the Bank, there was no warrant for a base infeftment, the obligation to infeft being only a me. On this precept, sasine was taken by the Bank in April 1817; but no confirmation was obtained from Mr Campbell, the superior.

The bill which had been drawn by Fleming was renewed in terms of the agreement in 1818, 1819, and 1820; but in 1821, he and another of the bill obligants having suspended payments, and no new drawers being substituted by Harley in their place, the Bank obtained a deed from all the bill obligants, authorising an immediate sale, in such lots as Thomson should deem expedient. In this deed, it was narrated, that Thomson had, in virtue of the disposition of April 1817, been 'duly infeft in the 'said respective heritages.'

About the same time the Bank used diligence upon the last renewed bill, due in April 1821, by horning and caption, against Fleming, who thereupon made a partial payment of £300. In 1822, Harley's affairs having again become embarrassed, a sequestration of his estate and effects was awarded under the bankrupt statute. In the meanwhile, the Bank had applied to the superior for a confirmation; but it was not obtained in consequence of a dispute relative to the arrears of feu-duty. The trustee under the sequestration, however, proceeded to charge the superior to enter him; and a charter of adjudication having been executed in his favour, he was found preferable to the Bank in an action, which was brought to decide the question.

An agreement was then entered into between the Bank and Cook and Cuthel (the two trustees, who had conveyed the property), by which the Bank consented to withdraw all opposition to the competing right of the trustee on the sequestrated estate; and the trustees bound themselves to account to the Bank for the amount of the proceeds which should be realised by the judicial trustee out of the estate, to the extent of the claims which the Bank had under the bills. The judicial trustee was then infeft, in virtue of the charter of adjudication; and the Bank having charged Fleming to pay the balance of his bill, he brought a suspension on the ground, 1st, that as he was a cautioner, and the subjects had been conveyed to the Bank both for his

and their security and relief; and as they had neglected to make them effectual by delaying to obtain a confirmation, they had lost recourse on him; and 2d, that the charge was premature, as the Bank was bound to renew the bill till April 1822, whereas the charge was on the bill which fell due in April 1821. In answer to this, Thomson, on behalf of the Bank, besides denying the validity of these pleas, offered to put Fleming in the same situation in which he would have stood, if the security over the lands and others had been effectually completed previous to the charter of adjudication granted in favour of the judicial trustee, or at least to put him in an equally good situation. The Lord Ordinary appointed Thomson to give in a condescendence of the facts by which he considered he was entitled to charge the suspender before Whitsunday 1822, and to annex a minute stating more explicitly the nature of this offer. He accordingly did so; and explained that as he would have been bound, in terms of the back-bond (had the heritable security been effectual), after receiving full payment of the sums of money, principal, interest, expenses, and damages of every kind, to convey the heritable property, if unsold, to Fleming and the other bill obligants, in proportion to their advances; and if sold, to divide any balance of the price among them in the same proportion; and as the heritable security was not now effectual, he was willing to account to Fleming for the price of the subjects under the above deductions, as the same should be ascertained by any sale to be made by the trustee. May 23, 1826.

Thereafter, the Lord Ordinary, on advising memorials, found the letters orderly proceeded, and decerned with expenses; and the Court, on the 24th November 1825, adhered; but remitted to the Lord Ordinary to hear parties on any other points of the cause.*

Lord Hermand.—The interlocutor is quite right. There were here two securities—the one without prejudice of the other. But because the one has not proved available to the Bank, can it possibly be maintained that they were to lose the benefit of the other? Certainly not. As to the plea, that the Bank were bound to renew the bill, the suspender had become insolvent, and therefore a renewal was out of the question.

Lord Balgray.—It is impossible to get the better of the terms of the deed. The lands and the bills were to be corroborative

* See 4 Shaw and Dunlop, No. 178.

May 23, 1826. securities, without prejudice to each other. The heritable security was given to the Bank tantum et tale, as it was held by Harley and his trustees. It was the duty of those giving the security, to see that it was complete; and the obligants cannot get free, because the Bank has been deprived of that security.

Lord Craigie.—I am of the same opinion.

Lord President.—It is true, that all the parties thought the heritable property would be sufficient to pay the debt; but then there is a stipulation that it should not prejudice the claim of the Bank against the obligants in the bill. The circumstance of its being lost cannot avail them.

Lord Gillies concurred.

Fleming appealed.

Appellant.—It was in the character of cautioner for Harley, that the appellant put his name on the bill charged on. He did so in reliance of ultimate relief from Harley's property, conveyed to the respondent not merely for the security of the Bank, but for the security of the appellant and the other bill obligants. This is not the ordinary case of a creditor having both personal and heritable security for payment of his debt; but the respondent became expressly bound to convert that security to the cautioners' use, in case they should be called on by the Bank. It was his duty to have made the security effectual; and having by his neglect destroyed the security on which the appellant relied, he has cancelled the cautionary obligation. Even on general principles, the respondent was responsible for his gross negligence. He was not entitled to neglect the cautioners' interests. The difficulty from the dispute about arrears, is a mere shadow. Besides, the respondent, by the agreement with the two trustees of Harley, has incapacitated himself from performing his obligation to the appellant, and excluded him from any benefit even under that management. The appellant was entitled to have exercised his discretion as to the defect in the security, but he was not consulted as to that transaction. The offer to put him in statu quo, is quite irrelevant. There is no principle more completely established, than that cautionary obligations are strictissimi juris, and must be literally fulfilled; but in point of fact, this is now impracticable. The provisions favourable to the cautioners in the back bond have flown off. But even if the appellant were not liberated from his enagement, the respondent was not authorised under the stipulation to which all parties had agreed, to enforce payment prior to Whitsunday 1822; and the charge is therefore incompetent.

Respondent.—In lending the money to Harley and his trustees, the respondent was entitled to require the best security. Accordingly, he took heritable and personal security; and all parties agreed that these securities were to be independent of, but at the same time corroborative of, each other. If one proves bad, that cannot affect the other. The respondent is in the ordinary situation of a creditor holding two securities, and of course having power to make his debt good out of either of them. It was no part of the respondent's duty to see that the conveyance of Harley's heritage was unimpeachable. The respondent has done nothing to impair or alter it. It is still in as complete shape as when it came into the respondent's hands. It was not confirmed by the superior, owing to a dispute with Harley as to the amount of the arrears of feu-duties. Besides, the respondent would have challenged the Lord Ordinary's interlocutor, preferring the trustee in Harley's sequestration, had not Harley's two trustees offered the terms contained in their agreement. He had no right or interest to demand more. The respondent came under no obligation to obtain indefeasible heritable security to relieve the cautioners. That was their own duty; and they, under their hands, in the deed of May 1821, admit that the respondent was 'duly infeft.' But the respondent has offered, and is willing, to place the appellant precisely in the situation in which he would have stood, had the heritable security from the first been effectual, and to account on that principle. The bills were to be renewed, only if the drawers and indorsers remained solvent; and accordingly, the appellant paid three-fifths of his bill, on that understanding. May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be reversed; and that the letters be suspended simpliciter.

Lord Gifford.—My Lords, this is an appeal against several interlocutors of the Court of Session, pronounced in a proceeding before them, arising out of the circumstances which I will endeavour shortly to state to your Lordships. It appears, that a person of the name of Harley, at Glasgow, having become embarrassed in the year 1816, offered a composition of 8s. 9d. in the pound on his whole debts, which was unanimously accepted of. It was agreed that the composition should be paid by four different instalments, for which Harley and Co. should grant their bills, payable at six, twelve, eighteen, and thirty months; and that, in security of the two first instalments, Harley and Co. should convey their whole heritable and moveable property to certain persons, as trustees for their creditors, and find good personal security for payment of the third. This

May 23, 1826. agreement was carried into effect. Harley and Co. granted their bills for the stipulated composition; and, on the 19th of June 1816, Mr Harley executed a general conveyance of the whole heritable property, in which the trustees were infeft; and they took possession of the moveable property by an instrument of possession. However, my Lords, when the second instalment became due, the trustees found it was impossible for them to discharge the bills which had been granted for it; and, in consequence of that, an application was made by Mr Harley and his trustees to the Branch of the Royal Bank at Glasgow, for a loan of £7990 for five years, on the security of Mr Harley's heritable property. It was also agreed, that Mr Harley should grant promissory-notes in the manner to be afterwards mentioned.

I should have stated to your Lordships, that the Bank being doubtful with respect to the extent of the security, and whether they were not bound to have security in the shape of bills or promissory-notes, it was agreed, that, in addition to the security of Mr Harley's heritable property, he should grant promissory-notes to those gentlemen who came forward to befriend him to the extent of £6500; which notes were to be indorsed by the granters to the Bank. Harley's own bill was to be granted for £1490; which made up the whole sum of the loan agreed to be made by the Bank. As I have stated to your Lordships, promissory-notes were to be drawn by him, and indorsed by persons as his securities to the Bank.

Your Lordships perceive, therefore, that the Bank were to have a double security; they were to have the security of the heritable property which Mr Harley possessed, and the security to the extent of £6500 by those promissory-notes, to be indorsed by friends of Mr Harley to the Bank. In consequence of this, a disposition was made by Mr Harley to Mr Thomson, who represented the Branch Bank at Glasgow. At the same time, Mr Thomson granted what is called in these proceedings a back-bond, an instrument to which it is material to call your Lordships' attention, because that instrument contains recitals respecting the nature of the transaction between the Bank and Mr Harley, and the nature of the engagment entered into by those different sureties for Mr Harley. It begins by reciting the disposition which had been made by Mr Harley to Mr Thomson of his heritable property. It then goes on to recite—

'And considering that it was a condition on which the foresaid sum of 'money was to be agreed to be advanced by the Bank, that bills to the 'amount of £6500 Sterling of the foresaid sums should at the same 'time be deposited with the Bank, to be held as corroborative securities 'of the sum advanced, as aforesaid, the one without prejudice of the 'other, with full power to operate on the foresaid obligations created by 'the bills, by horning, caption, adjudication, or otherwise, without hurt 'or prejudice to the heritable security created by the said disposition;'

then it states the number of bills which had been granted by the different sureties; which said bills Mr Thomson obliged himself to renew in favour of the drawers and acceptors thereof, and of such persons as might, with his approbation, be substituted in their place, until the term of Whitsunday 1822, under the usual discount.

It then goes on to state—'And considering, that although by the fore- May 23, 1826.
'said disposition, the lands, buildings, and other erections, conveyed as
'aforesaid, are absolutely and irredeemably disponed to me and my fore-
'saids, as above expressed, yet the truth is, that the same, as well as the
'bills above enumerated, were granted, and are to be held by me and my
'foresaids, in security to the Bank (and to the respective drawers of the
'bills, or such of them as shall be come under advance in consequence
'thereof, according to the several rights and interests of the Bank and
'them, but which right and interest of the drawers and indorsers shall
'never stand in competition with the interest of the Bank) of the repay-
'ment of the sum of £7990 Sterling, with interest, and other sums after
'specified; therefore I do hereby acknowledge, that I hold the several
'subjects, and also the foresaid bills, in security only, as aforesaid, of the
'repayment of the sum of £7990 Sterling, and of all interest, expenses
'of repairs, insurance against loss by fire, and any other expenses I or my
'foresaids may disburse in the premises, in the event of the same not
'being done by William Harley, or his foresaids, expenses and damages
'which may be incurred by the Royal Bank; and I bind and oblige my-
'self, upon the sum of £7990 Sterling being paid, and the granters of
'the bills being relieved thereof, with all interest, damages, and expenses
'that may arise thereon, to grant, execute, and deliver all writs necessary
'for divesting me and my foresaids of, and investing the drawers of the
'bills, or such of them as may be in advance with the several subjects;
'or in the event of their being wholly relieved, then to convey the same
'in favour of Harley;' that is to say, that if the drawers and indorsers of those notes should, under the circumstances, be obliged to pay the whole, or any part of the amount of the notes they had given, then the Bank was to invest those persons with the heritable subjects which had been conveyed to the Bank; but in case they were wholly exonerated and relieved from their obligation, Mr Thomson, on behalf of the Bank, was to convey this property to Harley and his trustees. And then this follows: 'Provided and declared, that in case the whole, or any part of the sums,
'principal, interest, and expenses, shall remain unpaid, either to the
'Bank, or any of the drawers of the bills, at the term of Whitsunday
'1822, the clause, or power of redemption, and obligations on me to con-
'vey, as above written, shall ipso facto become void and null; and in the
'same event, I and my foresaids shall then hold the said subjects abso-
'lutely and irredeemably, and have full power and authority, without
'further delay, and without the consent of the granters of the disposition,
'or the drawers of the bills, or their heirs or successors, and without any
'process or order of law whatever, to sell and dispose of the foresaid sub-
'jects, or any parts or lots thereof, which I or my foresaids may think
'proper, absolutely and irredeemably, by public roup in Glasgow, for
'what prices the same shall bring; and to receive and discharge the price,
'and grant all writs necessary for conveying the premises to the purcha-
'sers, heritably and irredeemably, in the most ample and valid manner;
'and to apply the price, and interim rents, if any be recovered, in the first

May 23, 1826. 'place, in payment of the expenses of the sale, and next in paying the 'sum of £7990 Sterling, or such part thereof as may be due at the time, 'with the interest thereof, and other sums before mentioned, either to the 'Bank, or to any of the drawers of the bills, according to the sums they 'shall be respectively in advance at the time; and lastly, account for and 'pay the remainder, if any be due, to the drawers of the bills, or any of 'them who may be in advance, and to Harley and his foresaids, or the 'trustees for his creditors, according to their respective rights and inte- 'rests; declaring, that in event of the drawers of the bills, or any of 'them, being actually in advance previous to the sale, they shall have a 'right to be consulted in the letting and selling of the property, but not 'to impede or obstruct the same;' and then it is further provided and declared, 'that the purchasers of the subjects shall have no right to retain 'the prices thereof, but shall be obliged to pay the same to me or my 'foresaids.' Then it was declared, that Mr Thomson, or the Bank, should not be obliged to do diligence for the rents of the subjects, nor be liable for the same, or any part thereof unoccupied, nor for arrears, but should only be liable for their own intromissions; and that although he or the Bank should enter into the possession thereof, by levying the rents, or otherwise, they should not be obliged to continue such possession, but might relinquish and resume the same as often as they might think fit.

Then it goes on—'And in respect it is not intended that the whole of 'the debt now contracted to the Royal Bank should remain undischarged 'during the whole period of five years, as above expressed, but that such 'a reduction should annually or termly be made from such arrangements 'as the drawers of the bills should think eligible to adopt respecting the 'premises, it is hereby declared, that they shall have right to enter into 'possession of, and receive and discharge the rents, and adopt such rules 'and management of the property, with consent of me or my foresaids, 'as they shall think expedient; and in the event of the said William Har- 'ley being made bankrupt, or of his sickness or death, or ceasing to attend 'to the management of the establishment carried on in the premises, 'or in the event of death, bankruptcy, or other contingency, rendering 'any one or more of the drawers of the bills unable to pay the amount 'for which he shall be bound, and of no other obligant being immediately 'substituted by Harley in the place of such drawer or drawers, it shall 'be in the power of me, or of my successors in office, or our assignees, 'with the consent of the drawers of the bills, if the property be sold in 'lots, to bring the subjects to sale, as above mentioned, at any period, 'three months after either of the above events may take place, and to 'apply the proceeds thereof in manner above expressed.'

My Lords, after these notes had been given, and the heritable property conveyed, and this back-bond executed, it appears, that in the year 1821 there was an instrument executed by the different persons who were liable upon these promissory-notes to the Bank, to which it may be necessary for me to call your Lordships' attention. That instrument recites the disposition made by Harley to the Bank; and that by virtue of

that disposition, Mr Thomson was at that time duly infeft in the re- May 23, 1826.
spective heritages. Your Lordships will by and by perceive, that that recital is not unimportant. Then it goes on to state, 'that it was a con-'dition on which the foresaid sum of money was agreed to be advanced 'by the Bank, that bills to the extent of £6500 Sterling should at the 'same time be deposited with the Bank, to be held as corroborative secu-'rities of the sum advanced.'

It then states the bills which had been given; and further, in regard that though, as to the disposition, the heritages are absolutely and irredeemably conveyed to him, as above narrated, yet the fact being, that the same, as well as the bills, were granted and to be held by him in security, as therein mentioned, of the foresaid sum of £7990 Sterling, with interest and consequents, therefore he thereby acknowledged and declared, that he should hold the same accordingly; and then he obliged himself to divest himself of the subjects, and convey the same to Harley, or to the drawers of the bills, or to such of them as might be in advance for any part of the sum; but expressly declaring, that in case the whole, or any part of the sums, principal, interest, and consequents, should remain unpaid at Whitsunday 1822, then the obligation and power of redemption should cease. And then it goes on further to recite the conditions of the back-bond, and to state, that the sums contained in the bills drawn by John Smith, John Fleming, William Dunn, George Brown, James Hill, and William Penny, amounting together to the sum of £2200 Sterling of principal, with the whole interests and consequents thereof, have been paid to the Bank; and that, in consequence of the death of John Sinclair, and of the failure of Dawson and Mitchell, bills or promissory-notes were received by Thomson from Archibald Cuthill and Robert Moffat, in lieu of those which had been granted by Sinclair and Dawson and Mitchell; that there remains due to the Bank the sum of £5790 of principal, together with interest from a date which is not filled up; that Thomas Edgar having suspended his payments in the month of June 1820, a requisition was made by Thomson to Harley, on the 22d day of the said month, to procure another drawer, in terms of the provision to that effect, above narrated, in his place, but which has not hitherto been complied with. Then it recites, that in these circumstances Thomson was entitled to sell the subjects without consent of the sureties; but as they were all of opinion, that it would be for the interest of all parties that the subjects should be sold in such lots as Thomson might think proper, and the prices applied in manner after mentioned, therefore anything to the contrary in the back-bond notwithstanding, and without prejudice to the bills held by the Bank, or to any diligence, personal or real, competent to follow thereon, they agreed that Thomson should sell and dispose of the heritable subjects by public roup in Glasgow, at such prices as he might think just and reasonable. It then directs, that the proceeds shall, in the first place, be applied in payment of the expenses of the sale, and of the whole expenses incurred in granting a disposition and other writs to the purchaser, and the other expenses which may be incurred in the premises; and next in payment of the said sum of £5790

May 29, 1826. sterling, or such part thereof as may remain owing to the Bank, with interest on the same; thirdly, in payment to the drawers of the bills who may be put in advance of the sums for which they are respectively bound, or any part thereof, rateably and proportionally; and, lastly, that Thomson should pay the residue of the prices and proceeds, if any be, to the trustees in right of William Harley, declaring, that any right or conveyance of the subjects to be granted by Thomson, in virtue of the powers committed to him, should be equally valid and effectual, as if the same had been granted by Harley, or with his consent, or that of the other subscribers thereto, or by the trustees.

After this, the Bank instituted proceedings against the appellant, Mr Fleming, who had been one of the sureties, for the sum remaining due upon his promissory-note, he having paid a proportion of it. Mr Fleming objected to the proceeding, on the ground that it was instituted before the expiration of the time at which, according to the original agreement, the parties were at liberty to renew their notes. Your Lordships will recollect, that although they gave notes payable at the end of twelve months after date, it was a stipulation in the original contract, that they were to be at liberty to renew them from time to time until the term of Whitsunday 1822. In consequence of this, my Lords, an action of suspension was raised by Mr Fleming, the present appellant, contending that the action had been brought too soon, that he ought to be permitted to renew those notes; and he also contended, on grounds I shall presently state to your Lordships, that the Bank had lost their remedy against him, in consequence of their not having completed the conveyance of the heritable property of Mr Harley. The case came on before the Lord Ordinary, who pronounced this interlocutor on the 28th day of February 1823. (Here his Lordship read the interlocutor, ordaining Thomson to state his offer as to putting Fleming in the same situation as if the security had been duly completed.)

My Lords, in consequence, a condescendence was put in, and an interlocutor was afterwards pronounced by the Lord Ordinary, who determined against the appellant, and found expenses due; and to this judgment he adhered.

This interlocutor was afterwards brought under the review of the Court of Session, who in the course of last year, 1825, affirmed the interlocutor of the Lord Ordinary; but remitted to the Lord Ordinary to hear parties on any other point in the cause.

I ought to have stated, in the order of time, to your Lordships, that after this conveyance by Mr Harley to the Bank, or Mr Thomson on behalf of the Bank, in the year 1822 Mr Harley became a bankrupt—his affairs became deranged irretrievably—a sequestration followed—and it was then discovered that the Bank, or Mr Thomson representing the Bank, had neglected to complete the conveyance which had been made to the Bank of the heritable property of Mr Harley. My Lords, it appears that this property had belonged to a Mr Campbell of Blythswood, who was the superior, as it is called in Scotland; and it appears that, by the disposition which had been granted by Mr Harley in favour of the respondent,

Mr Thomson, there was no warrant for any base infeftment; and that Mr Campbell of Blythswood inserted a condition in all his feu-rights, that his feuars should not grant subaltern rights, to be holden of themselves. It therefore was expressly stated in the disposition, that the lands were to be held only of and under Blythswood, Mr Harley's superior; and it was declared, that no base infeftment was permissible, although the disposition contained both procuratory and precept; but the precept was inserted solely for the purpose of enabling the Bank to make up their title by confirmation, if they should think that mode most convenient. May 23, 1836.

It appears, my Lords, that the respondent took infeftment upon the precept; but that infeftment was a nullity until it was confirmed by the superior, and gave Mr Thomson no title whatever in the lands. He suffered the title so to remain till the bankruptcy of Mr Harley, which happened in the year 1822. Upon Mr Harley's sequestration, it appears that an application had been made by the trustee of Mr Harley, to complete his title to this property; and proceedings were about to be, and I believe some proceedings were had between the trustee and the respondent, with respect to which of them was entitled to the preference to complete their title to these lands; and it was finally determined in favour of the trustee under the sequestrated estate; the consequence of which was, that Mr Thomson, representing the Bank, and the Bank, were deprived of the security they had over this heritable property. After the sequestration, however, an arrangement was entered into between the Bank and the former trustees of Mr Harley, to which Mr Fleming and the other sureties were no parties, by which it was arranged, that notwithstanding the trustee had, as I have stated to your Lordships, obtained a right to this property, yet it was considered equitable that the proceeds of the property should be applied to the benefit of the Bank; and an arrangement was entered into between Mr Thomson and the trustees, reciting, that the title to this property had not been completed by the superior, and reciting the competition which had ensued between Mr Thomson and the trustee on Mr Harley's estate; and then the agreement proceeds in this way—'And whereas the said James Cook and 'Archibald Cuthill, who are considerable creditors upon the estate of the 'said William Harley, being desirous to avoid further proceedings at law, 'in order that the estate may be more speedily winded up, and being 'satisfied of the equitable right which the said John Thomson has to 'the subjects conveyed to him by the foresaid disposition, have agreed 'to the following arrangement:' therefore Thomson consents and agrees to withdraw all further opposition, upon his part, 'to the claim made by the trustee on the sequestrated estate of Harley, to the property conveyed to him in security, as aforesaid; to assign, in favour of Cuthill and Cook, all claims and demands which he or the Bank had against Harley and his sequestrated estate, with the whole vouchers thereof, with the exception of the bill for £500, granted by Harley to Fleming, and indorsed to Thomson, being the bill charged on; and of another bill for £200, granted by Harley in favour of William Kilpatrick, also indorsed to Thomson. On the other hand, Cook and Cuthill bind

May 23, 1826. themselves to pay Thomson the amount of the net proceeds of the subjects contained in the disposition, granted by Harley in favour of the Bank, so soon as the subjects shall be sold by the trustee upon the sequestrated estate, and the prices divided among Harley's creditors.

New, my Lords, one question which was discussed at your Lordships' Bar was this, whether, looking at the arrangement which was made by these gentlemen who were sureties for Mr Harley, it was not clear that they entered into that arrangement upon the faith that this heritable property had been duly conveyed by Mr Harley to Mr Thomson for the behoof of the Bank. This, your Lordships cannot but perceive, might have been a very considerable ingredient in the consideration upon which these gentlemen became securities,—for this reason, that your Lordships perceive throughout the whole of the arrangement stated in the back-bond, this property was not only to be a security to the Bank for the advances they had made, but, if the sureties were to be called upon for the whole, or any part of the sums for which they had given security by promissory-notes, the property was to remain as a security to reimburse them those advances. Now, your Lordships perceive, that the property was conveyed to Mr Thomson. Mr Thomson knew, therefore, that it was incumbent upon him—at least he must be taken to have known that it was incumbent upon him, to have confirmed that security, by obtaining a charter from Mr Campbell of Blythswood; and in the subsequent arrangement of 1817, in which the sureties conferred a power upon the Bank of selling by lots, it was recited, that Thomson had taken infeftment on the precept, but had not obtained, or ever applied for, confirmation of his disposition and sasine. Now, Mr Thomson says, It is true that I did not apply for confirmation of the disposition and sasine, but it was incumbent on Mr Harley, or you the sureties, who were interested in seeing that Mr Harley did his duty, to have had this completed. It was therefore your duty to take care that this part of Mr Harley's duty was done. He said also, When I came, in the year 1822, to ask for this charter of confirmation, I found there was a considerable arrear of feu-duty, and Mr Campbell of Blythswood refused to grant this charter of confirmation without being paid the arrears of feu-duty. I was not called upon to pay those arrears, because I was not bound to make the advance; and it appeared, that even at the time the heritable property was conveyed, in 1817, there was an arrear of feu-duty; and it was not incumbent on me at that period to have paid that feu-duty. To this the sureties replied, You should have given us notice of this in 1817; and if you had given us notice in 1817, that it was necessary to complete the heritable security in the first place, we should have had time to consider whether we would not proceed against Mr Harley, unless Mr Harley paid up this feu-duty; or we might have considered it advantageous to us to assist you in the payment of it; but we say it was your duty to obtain that charter of confirmation, and by your having failed to do so, we have lost the benefit of that security, in the faith of which we have subscribed these promissory-notes.

It appears to me, my Lords, that when this matter came before the

Lord Ordinary originally, he appears to have been struck with the equity of this defence; for your Lordships will perceive, that he directed the respondent to give in a special condescendence, framed in terms of the act of sederunt, of the facts and circumstances by which he considered the Bank entitled to charge the appellant for payment of his bill previous to the term of Whitsunday 1822, and to annex to his condescendence a minute, stating the offer then made at the Bar;—for it appears an offer was made at the Bar, to put the appellant in the same situation as if the security over the feus held of Mr Campbell of Blythswood had been effectually completed, previous to the charter of adjudication granted by Blythswood in favour of the trustee on Mr Harley's sequestrated estate. My Lords, in consequence of this permission, the respondent, Mr Thomson, put in a condescendence; and, with respect to the first part of the interlocutor, he stated the reasons why he conceived himself entitled to proceed against Mr Fleming, the appellant, previous to the year 1822; but with respect to the other part of the interlocutor, he admitted that the security had been found to be ineffectual, but said, that the appellant was not thereby put in a worse condition, 'for 'the charger has offered, and now again judicially offers, to put him in the 'very same situation in which he would have stood, if the security over 'the feus held of Mr Campbell had been effectually completed previous 'to the charter of adjudication granted in favour of the trustee on Mr 'Harley's sequestrated estate, or at least to put him in an equally good 'situation; that is to say, had the heritable security been effectual, the 'charger would have been bound, (in terms of the above-mentioned bank-'bond,) after receiving full payment of the sums of money, principal, in-'terest, expenses, and damages of every kind due to him, to convey the 'said heritable security, if unsold, to the suspender and the other bill-'obligants, in proportion to their several advances; and if sold, to divide 'any balance (after payment to him as aforesaid) among them, in the 'same proportion; and although the same heritable security is not now 'effectual, the charger agrees to account in the same manner to the sus-'pender for the price of the said security subject, as the same shall be 'ascertained by any sale or sales to be made by the trustee.' In answer to this, Fleming says, 'that it was irrelevant to offer to put him in an 'equally good situation with that in which he would have stood, had the 'security on which he relied not been destroyed; and that, in point of 'fact, it was impossible to put him in the same, or an equally good situa-'tion.' May 23, 1826.

My Lords, this condescendence and the answer coming before the Lord Ordinary, his Lordship, feeling the question to involve points of law of importance, ordered the case to be stated in memorials. That was done, and his Lordship, as I have already stated, found the letters orderly proceeded; and the Court of Session adhered, but remitted to the Lord Ordinary to hear parties on any other points in the cause. My Lords, it is extremely difficult to know what the Court of Session meant, in remitting to the Lord Ordinary to hear parties on any other points in

May 23, 1826. the cause. The Lord Ordinary's interlocutor found the letters orderly proceeded, and decerned; and therefore it was a final adjudication of the cause. But, laying this aside, it appeared to be admitted in the discussion at the Bar, that if it was incumbent on the Bank to make good that heritable security, by obtaining confirmation of the charter, the offer made at the Bar could not avail them, for it was impossible for them to put the sureties in the same situation as they would have been under the original arrangement; for if the sureties had been called upon to pay their money, the Bank would have been compellable, as they state in this offer, to have conveyed the property to the suspender, and the other co-obligants, in proportion to their several advances, and they would have a right to dispose of this property; but all they say is—admitting we have no title to this heritable property, we have made an agreement with the trustee on the sequestrated estate, that he shall account to us for the price for which this property sells, and we will account to you for whatever we receive. My Lords, that arrangement was made with the Bank without any concurrence of the sureties, and that is not an unimportant circumstance; because, if it was incumbent on the respondent originally to have taken the title in the manner I have stated, I apprehend, at all events, the sureties were entitled to be consulted in the arrangement to be made with the trustee upon this subject. However, they were not consulted. But really the main question in the cause is this, Whether or not the completion of the title to the heritable property by the agent of the Bank, was not a material part of the agreement entered into with these sureties. If it was, Was it not incumbent upon the Bank to have completed their title; or if there was any difficulty in their completing that title, by there being an arrear of feu-duties, Was it not incumbent upon them to give notice to the sureties, when they made this arrangement with the trustee, that the sureties might exercise their discretion, whether they would advance those feu-duties, or would insist, as the appellant does now insist, that he will have nothing to do with it, because he conceives it was the duty of the Bank to complete their title to this property?

My Lords, upon the best consideration I have been able to give this case, I think that the sureties entered into this engagement on the faith of this heritable property having been conveyed to the Bank; that it was incumbent on the Bank to obtain a conveyance of this property; and that, by not doing so, they have placed the sureties in a situation in which they never intended to have been placed, and in which they never would have been placed but for the negligence of the Bank;—that that being so, the offer which they made at the time the case was before the Lord Ordinary, could not do away with the effect of their former omission, for this reason, that the offer could not place the sureties in the situation in which they had a right to be placed under the original agreement; that they are entitled to have the property under their control, for the repayment of themselves if they were called upon; that that cannot be, and that they are not bound to take into their consideration, whether Mr Thomson subsequently made an arrangement with the trustee to secure that property for the

Bank, the property being to be sold now by the trustee under this sequestrated estate. May 23, 1826.

My Lords, I think very considerable doubts might also have been entertained upon the question, whether the Bank were entitled to sue the surety before the time for renewing those bills; but it is unnecessary to enter into that; for considering, as I do, that the surety has been discharged by the conduct of the Bank, by their negligence in not obtaining the charter of confirmation, and not giving notice to them when the transaction came to their knowledge, I think, for these reasons, the interlocutors of the Court of Session cannot be supported, but that they must be reversed. I would therefore propose to your Lordships to reverse this judgment, giving, therefore, the appellant the benefit of that defence he made in the Court below, and which he was, I apprehend, justified in making.

Appellant's Authorities.—2 Ersk. 3. 20.—2. 7. 15.—Thomson, Jan. 29, 1822, as reversed in 1824.—Paisley, Jan. 13, 1779. (8228.)—University of Glasgow, Nov. 18, 1790. (2104, and Bell's Cases, 134.)—M'Lagan and Co., Nov. 19, 1813. (F. C.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

GOVERNORS OF HERIOT'S HOSPITAL, Appellants.—*Keay—Robertson.* No. 25.

T. COCKBURN, J. C. MAXWELL, and OTHERS, Respondents.

Superior and Vassal—Servitude.—Held ex parte (reversing the judgment of the Court of Session) that a vassal in an urban tenement is not entitled to retain his feu-duties, on the allegation that the superior has bestowed on him a servitude altius non tollendi over houses on the opposite side of the street, which had been violated—the vassal having been found to have right to enforce that servitude by having the houses reduced in height.

IN 1806, the Magistrates of the city of Edinburgh, Messrs Winton and others, and the Governors of Heriot's Hospital, proprietors of ground in the northern part of the New Town of Edinburgh, entered into a contract for laying it out in streets, rows, crescents, &c. agreeably to a ground plan, which each, in regard to their respective properties, became bound to adopt. Among other stipulations, it was agreed, that in no case should the houses in certain streets, and among others, India Street, exceed in height 46 feet, from the level of the street to the top of the front wall. May 23, 1826. 1ST DIVISION. Lord Meadowbank.

In 1807, the lots in India Street (being the property of Her-

May 23, 1826. iot's Hospital) were exposed to sale, under articles of roup. These articles made no reference to the contract of 1806, but mentioned the ground-plan, and contained a clause limiting the height of the houses to 46 feet. No offerers appeared at the sale; but in the course of the same year, Wallace, an architect, feued 115 feet on the east side, and 115 feet on the west side of India Street, on the terms and conditions of the articles of roup. Having erected a house on the west side, he sold it to Maxwell, who obtained from Heriot's Hospital, the superiors, a charter, which was subscribed by Wallace as a consenting party, as he had not obtained a feudal title to the subject. By this charter, there was conveyed to Maxwell, 'all and whole the foresaid 'area, or piece of ground, on the west side of India Street, in 'the new extended royalty of the city of Edinburgh, consisting 'of 28 feet in front neat measure, conform to said certified mea-'surement with the buildings erected by the said William Wal-'lace thereon;' and it also provided, that in no case should the walls on the area exceed in height 46 feet from the level of the street. Other houses were erected on the other feus, on the west side of the street, and in like terms conveyed by the Hospital, with consent of Wallace, to Cockburn and others; but in none of the charters was there any express servitude granted to the feuars over the ground on the opposite side of the street, or any declaration that the houses to be there built should not exceed the above height.

Some time thereafter, the ground on the east or opposite side was acquired from the Hospital by Dobson, Traquair, Wallace, and others, builders, on the conditions in the articles of roup; and houses were erected, whose front walls exceeded the limit of 46 feet, although a protest had been taken by Cockburn and others, when this became apparent. These houses were purchased by different individuals.

Cockburn, Maxwell, and others, then raised an action in the Court of Session against the builders of the houses on the east side, and against the Governors of Heriot's Hospital; the summons of which, after reciting the contract of 1806, the articles of roup, the sale to Wallace, and the purchases which the pursuers had made, and that the defenders had acquired areas on the east side of the street, and were bound to perform the several obligations incumbent on the feuars by the articles of sale, proceeds:—'But notwithstanding of their said obligations, 'true it is, that the said William Traquair and Robert Dobson, 'William Wallace, and Robert Wright, have not only in various 'instances contravened and disregarded the same, in spite of

'repeated remonstrances on the part of the pursuers, made un- May 23, 1826.
'der the form of notorial protests and otherwise; but the said
'superiors have also abetted the said defenders in their unlaw-
'ful operations, both by refusing to interfere in preventing the
'same, and by themselves or their superintendant expressly
'sanctioning in some instances various deviations from the
'said stipulations.' The summons then concludes:—'That it
'ought and should be found and declared by decree of the
'Lords of our Council and Session, that the said William Tra-
'quair and Robert Dobson, as a company and as individuals;
'William Wallace and Robert Wright, in respect of their ha-
'ving committed the foresaid deviations; and also the said Go-
'vernors of George Heriot's Hospital, in respect of their having
'themselves, or by their said superintendant, sanctioned the
'foresaid erroneous plans and other deviations, or otherwise,
'have severally been guilty of a breach of the foresaid contract
'and articles and conditions of roup; and the said William Tra-
'quair and Robert Dobson, as a company, and conjunctly and
'severally, as individuals, William Wallace and Robert Wright,
'ought and should be decerned and ordained by decreet of our
'said Lords, respectively, to take down the foresaid houses, se-
'verally erected by them on the said areas on the east side of
'India Street, and to erect tenements thereon not exceeding
'forty-six feet in height from the level of the street, to the top
'of the front wall, the said heights to be taken at the middle
'of the tenement, and according to plans to be approved of
'by the preses of the ordinary committee of the said hospital,
'the superintendant of the hospital, and the Dean of Guild of
'the city of Edinburgh, and in every other respect in terms of
'the foresaid articles and conditions; or at least, the said de-
'fenders ought and should be decerned and ordained severally
'to take down as much of the foresaid tenements respectively
'belonging to them, as will lower the same to the foresaid limits
'prescribed as aforesaid: and farther, it ought and should be
'found and declared, that the pursuers are entitled to retain and
'withhold payment of the feu-duties respectively payable by
'them for the said subjects belonging severally to them; and
'the said Governors of the said hospital, the superiors thereof,
'ought and should be prohibited and discharged from demand-
'ing from the said John Clerk Maxwell, or his heirs and suc-
'cessors, the foresaid feu-duty payable by him; and the said
'Governors, and also the said William Wallace, for all right and
'interest he has in the feu-duties payable by the said John Cock-
'burn and Mrs Janet Dunlop, pursuers, ought and should be

May 23, 1828. 'prohibited and discharged from demanding payment thereof 'from them, or their heirs and successors; and that aye and 'until a due and strict observance of the said articles and conditions in every respect is obtained: and the pursuers should not 'be liable for interest upon the said feu-duty so retained, but 'only from the time that it shall be duly certified to them, that 'the foresaid houses have been reduced to the stipulated height, 'and are in every respect conform to the foresaid articles of 'roup.' Then follows a conclusion for penalties and expenses.

The Governors of Heriot's Hospital in defence stated, that they, as superiors, had no interest to enforce the stipulation relative to the height of the walls of the houses; and that the pursuers had no right to retain their feu-duties.

The Lord Ordinary found, that 'by mutual contract entered 'into between the corporation of the city of Edinburgh, the Governors of Heriot's Hospital, and Messrs Winton and Morison, 'in the year 1806, the said parties, in contemplation of streets 'and buildings, according to a regular plan, being formed and 'erected on the several parcels of ground then belonging to each 'of them, agreed to impose, and thereby did impose, on those 'several parcels, certain limitations and restrictions, of the nature of negative servitudes on each of their properties, calculated, if enforced, to improve and to raise the value of the same 'respectively: That the rights thereby created were not personal to the several guarantees, but became part and pertinent 'of all and every part of the lands therein referred to, and passing along therewith to the singular successors of the then proprietors of the said several dominant tenements: That in all 'cases whatsoever where rights of this description are constituted by two or more proprietors in favour of the lands belonging to each other, and the said lands are afterwards split or 'divided into different parts or parcels, the owner of each part 'or parcel originally acquires the same right to the benefit thereof which appertained to the whole when in the hands of the 'original proprietor; and that he thereby becomes vested with 'the same power that belonged to the said proprietor, of enforcing 'against the owners of the other lands therein included observance of all the stipulations of the contract: That when, from 'the nature of the servitudes or limitations imposed, the same 'would, for the purposes by the contracting parties avowedly 'professed, be utterly useless unless the same were observed 'and enforced universally over the whole subjects included in 'the contract; and where the object of imposing such limitations is to enable the contracting parties to feu out and sub-

'divide the same into small parcels and portions, and particu- May 23, 1826.
'larly for the formation of streets and squares upon a regular
'plan, and that for sums of money, feu-duties, or annual-rents,
'greatly larger than the same would have brought had no such
'limitations existed; it is and must be implied (no provision
'being made to the contrary), that the said parties did thereby
'come under a legal and binding obligation not only to enforce
'observance of the same as against each other, more especially
'at the first formation of the streets and erection of the build-
'ings, but to transmit a similar right to those by whom the said
'feus or subdivisions might be acquired, as against all and sun-
'dry into whose hands soever the said properties, either in whole
'or in portions, might eventually fall, and that whether the
'same did originally belong to themselves, or to the other par-
'ties included in the contract: As also, that where such sub-
'divisions have been made and disposed of for the said purposes,
'and for sums of money, feu-duties, or annual-rents, of the de-
'scription and amount foresaid, payable to parties similarly
'situated with those herein before contemplated (and where no
'provision is made to the contrary), the said parties originally
'contracting, notwithstanding the communication of their right
'of enforcing the said limitations and servitudes to those acqui-
'ring the said portions of their properties separately, do them-
'selves, not only continue bound to enforce observance of the
'limitations as before, and more particularly at the first forma-
'tion of the streets and erection of the buildings, but must by
'law be held to have incurred an obligation to that effect in con-
'nexion with and in relation to all and each of their own dis-
'ponees or subfeuars: That the said obligation must in such
'case be held to have constituted and formed a condition under
'which the price, annual-rent, or feu-duty, was agreed to be
'paid, and on the failure of the said parties respectively duly to
'enforce observance thereof, at least at the first formation of the
'streets and erection of the buildings then in contemplation,
'that the said disponees or subfeuars must have by law a suffi-
'cient right, not only to retain in their own hands whatever
'parts of the said price, feu-duties, or annual-rents, due by them
'on account of their several portions or subdivisions, may be due
'or unpaid, but also to sue for and recover whatever damages
'they may be able to qualify as having been created to them by
'the neglect of their author, landlord, or superior, in failing
'duly himself to implement, or to cause the other parties obli-
'gants to implement, the several obligations incumbent upon
'them: That the contract (1806) aforesaid not only was not

May 23, 1826. ‘ resiled from nor annulled by the parties, rebus integris, and ‘ when alone it was in their power so to have done; but the same ‘ has hitherto continued unrevoked and uncancelled, and the ‘ obligations thereof are at the present day equally valid, bind- ‘ ing, and effectual, as when originally imposed: That in pursu- ‘ ance of the views entertained by the parties at the date there- ‘ of, the several properties therein included were sold out and ‘ feued for the purpose of forming certain streets and lanes, places ‘ and squares, and of erecting houses thereupon according to ‘ a regular plan or design; and in particular, that the property ‘ then belonging to the defenders, the Governors of George He- ‘ riot's Hospital (and with special reference to which the said ‘ contract is entered into), was, in the year 1807, and years sub- ‘ sequent thereto, sold and disposed of in several portions or ‘ subdivisions for the purposes aforesaid; and amongst others, ‘ for the purpose of forming the street called India Street, in ‘ which the houses belonging to the pursuers have since been ‘ erected: That in the articles of sale then made out by the said ‘ defenders, and in terms of which the several portions of their ‘ property were disposed of, it was, amongst other limitations ‘ and restrictions, specially provided and declared, that in no case ‘ shall the houses to be built thereon “ exceed forty-six feet from “ the level of the street to the top of the front wall, the said “ height to be taken at the middle of the tenement, so that the “ whole side walls may be upon one level as well as the roof:” ‘ That by the condition foresaid, not only was the attention ‘ of the pursuers and others acquiring rights to the portions ‘ of the property of the said defenders directed to the corre- ‘ sponding limitation, restriction, or servitude, imposed by the ‘ contract entered into in the year 1806, but the binding and ‘ and effectual nature of the same was thereby recognised and ‘ confirmed: That it is not only not averred, but must be ad- ‘ mitted, that the several portions of the property then and there- ‘ by disposed of to the pursuers and others by the said defend- ‘ ers, were sold, let, or feued for prices, annual-rents, or feu- ‘ duties, greatly exceeding in amount what would have been ob- ‘ tained for the same, had the limitations, restrictions, or servi- ‘ tudes aforesaid, not been previously imposed, held out by the ‘ proprietors, and believed and understood by all concerned to ‘ adhere to every part and parcel referred to in the contract ‘ 1806: That there being in the said articles of sale no provi- ‘ sion to the contrary, it must be held that the defenders, the ‘ Governors of George Heriot's Hospital, not only conveyed to ‘ the pursuers and the other purchasers of the property thereby

'sold, the right of enforcing against all and sundry, into whose hands soever had fallen, or at any subsequent period might fall, any parts and portions of that property, with reference to which the said contract of 1806 was entered into, all and each of the limitations, restrictions, and servitudes aforesaid, and particularly that above recited; but did thereby themselves also become bound to enforce, at the formation of the streets and erection of the buildings then in contemplation, all and each of the said limitations, restrictions, and servitudes, in consideration of which, chiefly, if not solely, the said purchasers upon their parts became liable in payment of large sums of money under the name either of price, annual-rent, or feu-duty, quite disproportionate to, and greatly exceeding, the value of the parts and portions acquired by each of them respectively, had no such limitations, as well on the portions conveyed to themselves as on those disponed to and acquired by others, whether forming a part of what belonged to their own authors, or to the other parties to the said contract, or not, been imposed, or their observance neglected, or not duly enforced: That in the charters to the pursuer, John Clerk Maxwell, Esq. and William Wallace, architect, the author of the other defenders, the whole limitations contained in the articles of sale aforesaid, and the contract 1806, are expressly repeated: That in the articles of sale also inserted in the charters aforesaid, special provisions were inserted, requiring that the purchasers of the different portions of the said property should "present elevations of their respective buildings to the Preses of the Ordinary Committee of Heriot's Hospital, and the Superintendent of the said Hospital, for the time being, of their respective buildings; and also to the Dean of Guild of the city of Edinburgh and his Council, the foresaid property being now comprehended within the royalty of the city, and shall execute their said buildings agreeably to the elevations to be approved of by them; and no buildings shall be begun until such time as the elevation thereof is approved of in the manner above mentioned;" and that, from the terms of this provision, as well as from those of the clause therein also contained with relation to the plan by which the said defenders expressly declared themselves to be bound to execute the same, in so far as the Hospital's property extended; and from the nature of the objects in view, and the great interest which the Hospital possessed, that the limitations, restrictions, and servitudes aforesaid, should be enforced, the pursuers and all other purchasers

May 23, 1826.

May 23, 1826. 'were entitled to rely upon every legal, necessary, and proper 'step being taken by the said defenders for preventing the neglect 'or violation thereof, in any particular whatsoever, at the forma- 'tion of the streets and erections of the buildings then in con- 'templation: That it is not denied that the restriction against 'erecting houses,—the front walls of which should not exceed 'forty-six from the level of the street, to be measured at the mid- 'dle of the tenements,—has been violated by the other defenders, 'Messrs Traquair and Dobson, William Wallace, and Robert 'Wright, by their erecting the houses complained of to a height 'considerably greater: That it is not only not alleged, but ex- 'pressly admitted, that no steps whatever were taken by the 'defenders, the Governors of George Heriot's Hospital, to pre- 'vent the erection and completion of the said buildings, and the 'consequent violation of the said limitation, restriction, or ser- 'vitude; but that it is proved by the several instruments of 'protest in process, that, as soon as the pursuers were fully cer- 'tiorated, and made aware that the said defenders Messrs Tra- 'quair and Dobson, William Wallace, and Robert Wright, had 'it in contemplation to violate the said restriction or servitude, 'due notice was served upon them by the pursuers that they 'would proceed to do so, and to complete their tenements re- 'spectively at their peril, and that every step would be taken 'for enforcing observance of those conditions under which the 'property had been disposed of by the Hospital: That the no- 'tice so given was sufficient to put the defenders in mala fide 'to proceed in erecting their buildings to a height greater than 'forty-six feet from the level of the said street, to be measured 'from the centre of the building: And therefore found, that the 'walls thereof must be reduced to a height not greater than 'forty-six feet as aforesaid; and ordained the said defenders 'to state in a special condescendence the measures which each 'of them respectively is willing to adopt for reducing the height 'of their buildings, in terms of the findings of this interlocutor, 'and within what time they will undertake to have the said ope- 'rations completed: Found, that the defenders, the Governors 'of the said Hospital, by having failed to enforce observance of 'the limitation, restriction, and servitude aforesaid, even after 'being duly warned that the same were in the course of viola- 'tion, have themselves violated the condition under which the 'different purchasers acquired their respective feus or portions 'of ground: And therefore, that the said John Clerk Maxwell, 'being a vassal of the said Hospital, is entitled to retain the

'feu-duties due by him, aye and until the observance of the said 'limitation, restriction, and servitude is duly enforced; but found 'that the other pursuers, John Cockburn, Esq. and Mrs Janet 'Dunlop, not having completed their titles with the said Hospi- 'tal, have no right to insist in that conclusion of the summons 'which has for its object to enforce the right of the said parties 'to retain the feu-duties due by each of them respectively.' May 23, 1826.

Traquair, Dobson, and others, the builders, and also the Governors of Heriot's Hospital, presented petitions to the Inner House, and on advising them with answers—

Lord Hermand observed—The defenders are bound by the terms of the charters. The case of Gibson* is not like the present one; and besides, I do not agree with the doctrine there laid down as to plans by the Lord Chancellor. Neither has the case of Burns† any application. Here there was an express contract, by which the houses were to be of a limited height, and the street to be in a certain form. The feuars bought their feus on that faith; and it might as well be pretended, that the superiors could alter the line of the street, as that they could permit an additional storey to be made to the houses. The feuars have an interest to resist this, and to enforce their rights by withholding the feu-duty till they obtain redress.

Lord Balgray.—I view the case in the same light. The contract of 1806 enters very materially into the case. The arrangement was a joint one from the first; and it was not intended for the benefit of the superiors, but of those who should be induced thereby to take feus from them. It was of no importance to the superiors whether the houses were a storey higher or not; but it was a matter of consideration to those who intended to reside in the street. The restraints were therefore intended for the benefit of the vassals; and having taken their feus on the faith that they would be enforced, and having acquired a right to this effect, I apprehend they are entitled to the remedies which they here demand.

Lord Craigie.—I am of the same opinion. Both the intention and the words of the contract are clear. We have nothing to do here with matter of taste. We must enforce a legal obligation, whatever may be the effect of it.

Lord Gillies.—I have great doubts as to the title of the pursuers to insist in the conclusions of their action. None of them

---

* May 4, 1814, 2 Dow, 307. † May 4, 1823, 2 Shaw and Dunlop, No. 277.

May 23, 1826. were parties to the contract of 1806. That was an arrangement among other parties. Then they no doubt got feu-charters; and there is a restriction in them as to the height of the houses; but that restriction applies to the houses to be built on their own areas; and there is no servitude altius non tollendi bestowed on them as to the houses on the opposite side of the street. There has been no jus quæsitum in their favour. The full right remains in the superiors; who, if they chose, might either dispense with or enforce the limitations.

Lord President.—Although I concur in the conclusion at which the Lord Ordinary has arrived, I cannot agree in all his findings, and therefore I think we ought to make an interlocutor of our own. If I am the superior of a piece of ground, and feu it out for houses, and stipulate in the first charter which I grant, that the houses shall only be of a certain height, I thereby unquestionably acquire a servitude altius non tollendi, which servitude is for the benefit of the rest of the ground remaining unfeued. When, therefore, I grant a second charter, with a similar restriction, there is in like manner created a servitude over that part, and in favour of the tenement already erected; so that in this way there is created in the progress of feuing a mutual right of servitude in favour of all the different feuars, which each of them is entitled to enforce, even although there shall be no express servitude granted in their respective charters over the houses of their neighbours. Each of the feuars becomes my singular successor in the right of servitude for which I have stipulated. But that is precisely the case here; and any of the feuars are entitled to have effect given to it, both against the other feuars and against the superiors.

The Court therefore found, in reference to the petition for the builders, 'That the respondents (pursuers) are in the right 'of the dominant tenement to the effect of being entitled to and 'enforcing the servitude in question, and therefore repelled the 'defences, and adhered to the interlocutor reclaimed against.'

And on the petition for Heriot's Hospital, they found 'That 'the respondents are in the right of the dominant tenement, to 'the effect of being entitled to and enforcing the servitude in 'question; and refused the desire of the petition, and adhered to 'the interlocutor reclaimed against, finding that the said John 'Clerk Maxwell, being a vassal of the said Hospital, was entitled 'to retain the feu-duties due by him, aye and until the observance 'of the servitude is duly enforced; but finding that the other 'pursuers, John Cockburn, Esq. and Mrs Janet Dunlop, not 'having completed their titles with the said Hospital, have no 'right to insist on that conclusion of the summons, which has

'for its object to enforce the right of the said parties to retain 'the feu-duties due by each of them respectively, and remitted 'to the Lord Ordinary to proceed accordingly.'* May 23, 1826.

The Governors of Heriot's Hospital appealed; † and the respondents making no appearance, the case was heard ex parte.

Appellants.—Even if the pursuers had no direct remedy against the builders, they would have had no right to withhold the feu-duties from their superiors. There is no clause in the charters, whereby the appellants became bound to warrant to them, that the front walls of the houses, which were subsequently to be erected on the east side of the street, should not exceed forty-six feet in height. Neither is there any ruling principle of law creating such a servitude. It is true, that when a superior feus a portion of his ground, and imposes a servitude over the portion so feued in favour of the remainder of his property, a second feuar acquiring that remainder will be held to have obtained the benefit of that servitude. But here the pursuers were the first feuars; and if any party acquired a servitude, it seems to be the builders, who feuing secondly gained the advantage of the servitude imposed on the pursuers' area. But although the appellants do not object to the pursuers' right to compel the builders to reduce the height of the houses, yet they cannot allow the principle to be carried the length of authorising the feuars to retain their feu-duty from the appellants the superiors, as a compulsitory on the other feuars to adhere to the terms of their charters. Besides, a superior has no interest, and consequently no title to pursue an action to compel a vassal to implement servitudes of this description. The pursuers completely failed in showing that the appellants came under any express agreement on the subject. Neither had the assertion any foundation, that they abetted the other defenders in their unlawful operations. But the pursuers are clearly acting illegally in insisting on retention of their feu-duties, seeing that they have now the remedy in their own hands, and can in their own persons demand directly from the builders the redress which they seek from the appellants as superiors.

The House of Lords declared, 'that John Clerk Maxwell is 'not entitled to retain the feu-duties due by him, as has been

---

* See 4 Shaw and Dunlop, No. 109.

† Dobson and others did not appeal.

May 23, 1826. were parties to the contra
among other parties. Th
there is a restriction i
that restriction appl
areas; and there is
them as to the h
has been no ju
mains in the
with or enf
Lord P
the Lor
ings,
our
ou
t'

...AL v. COCKBURN, &c.
...of in said appeal; and
...at the said interlocu
...ed of, and as is
...same are h
...the cause
...d, to p
...on,
...the
...nors of Heri
...in this case, whether I sh
...resent, to come to any determination on
...idering the case for some time, it does ap-
...o in view what I shall have to say to your Lord-
...judgments which have been pronounced in this case,
...e Governors of Heriot's Hospital, and another against the
...des—that probably your Lordships ought not to object to come
...decision upon the appeal pending before your Lordships.

My Lords, the Governors of Heriot's Hospital are proprietors of a considerable territory, as is perhaps known to some of your Lordships, in the city of Edinburgh; and, amongst others, they are proprietors of a lot on the west side of a street, called India Street, on which the dwelling-house of Mr Maxwell, who is a pursuer in this action, is erected: and they are also proprietors of land on the east side of that street.

It appears, that in the year 1806, the Provost and Magistrates of Edinburgh, who are also proprietors of lands, called Bellevue, and the appellants, who were proprietors of the grounds to the west of those last mentioned, all of which now form the northern part of the New Town of Edinburgh, and of which place India Street is a portion, entered into an agreement for laying out the ground into streets; and among other stipulations they then entered into, there is a stipulation, that the houses in India Street were not to exceed forty-six feet in height, from the level of the street to the top of the front wall. This land was then laid out by ground-plans, into streets, and squares, and crescents; but in the year 1807, the Governors of Heriot's Hospital exposed to sale certain lots in Howe Street, and the whole of the lots in India Street; and in the articles of sale, no reference is made to this contract entered into in 1806. The only reference is to the ground-plan which had been made, which is to show the number of the streets and the squares, and whatever they were, of this property. Upon that occasion, a Mr Wallace, an architect in Edinburgh, not at that sale, but after that sale, agreed to purchase 115 feet on the east side of India Street, and 115 feet on the west side of that street, at a certain sum per foot. He afterwards erected on part of this ground, on the west side of India Street, a dwelling-house, which he sold to Mr Maxwell, who is one of the respondents in this case.

May 23, 1826.

by means of the right you have and if you have, why are you to nothing to do with enforcing ll, by you. The Court have ud having told you that, it to say, that until this be adopted by Heriot's e case in this point I ought to trou- hall I hint any had no right ide—then Lord- you be ot

In that ca... opposite side of the ... oned. It so happened, that ... other houses on this land which he had ... quent to the date of the charter granted to Mr M... erected on the east side of India Street by Mr Wallace an... duals—Mr Wallace having contracted not only for 115 feet on ... side, but also a portion of the ground on the east side;—and it appea... that some of the houses erected on the east side of India Street have exceeded forty-six feet in height.

Mr Maxwell considered himself aggrieved by the parties having exceeded the height which he conceived they ought not to have exceeded; and he instituted an action against the builders, the proprietors of these houses in India Street, and against the Governors of Heriot's Hospital; by which action he seeks to compel the persons on the opposite side of the street to reduce their houses to the height of forty-six feet; and he seeks also to be relieved from the feu-duty which he had contracted to pay, being in the nature of an annual sum to Heriot's Hospital, until the houses on the opposite side of the street shall be reduced to forty-six feet. This was resisted by the Governors of Heriot's Hospital. They contended, that this gentleman had taken his feu-charter, and must be bound by the stipulations in that feu-charter, in which there were no obligations on the part of Heriot's Hospital to restrict the parties on the east side of the street not to exceed forty-six feet in height; and the persons on the opposite side of the street said that he had no right to interfere. However, on the case coming before Lord Meadowbank, as the Lord Ordinary, he pronounced a very long and elaborate interlocutor; and the result of his findings was, as against the persons on the opposite side of the way, that they must reduce their buildings to a height not exceeding forty-six feet; and he finds, 'that Mr Maxwell, being a vassal of the Hos-'pital, was entitled to retain the feu-duties due by him, aye and until the 'observance of the said limitations, restriction, and servitude, is duly en-'forced;' but, that the other parties, not having completed their titles with the Hospital, were not entitled to retain the feu-duties due from them respectively to Heriot's Hospital.

My Lords, this matter was brought before the Court of Session by two petitions, one by the proprietors of the houses on the opposite side of the

May 23, 1826. street, and another on the part of Heriot's Hospital. Now, with respect to the petition of the proprietors of the houses on the opposite side of the street, the Court of Session pronounced this interlocutor. (His Lordship then read the interlocutor.) They therefore found, that against those proprietors on the east side of the street, the respondents were in the right of the dominant tenement—a right which entitled them to the servitude in question—the servitude being an obligation on the part of those persons, not to build their houses higher than forty-six feet.

Upon the petition of Heriot's Hospital they found—(His Lordship here read the interlocutor.) Now, your Lordships will perceive the effect of this interlocutor amounts to this—and to be sure, if it be well founded, it is a very serious finding as it affects the rights of Heriot's Hospital—that Mr Maxwell is not bound to pay Heriot's Hospital any feu-duty which he has contracted and stipulated to pay them, until the parties on the other side of the street have reduced their houses in height to forty-six feet. The consequence of this decision is, that every tenant on that side of the street, holding under Heriot's Hospital, if this decision be well founded—every one of them has a right to say, 'We will not pay our 'feu-duty to you until this has been effected by the tenants on the other 'side of the street;' and therefore they will be entitled to retain the whole of the revenue in respect of this property, which the Hospital is entitled to receive by the terms of the charter; and the Hospital is the more aggrieved, because it has been found, that Mr Maxwell has a right to enforce the servitude against the proprietors of the houses on the east side of the street; and therefore they say, 'it having been found, that under the feu-charter 'granted to you by us, you being in the right of the dominant tenement '(as they term it), have a right to enforce this servitude against the 'parties holding under feu-charters the houses on the east side of the 'street, why do you seek to retain the feu-duties against us, when the 'Court themselves have pronounced that you have a good cause of action, 'by means of the feu-charter we have granted, to enforce this servitude 'against those residing on the opposite side of the street?' Upon this ground they have appealed; and no one has appeared on the part of the respondents to support the judgment below. I confess to your Lordships, that when this case was heard, and since that time, it has perplexed me not a little, in considering whether your Lordships could proceed with propriety upon this appeal, till you knew the final result of the action as regards Mr Maxwell and the inhabitants on the other side, for whether they acquiesced in the judgment below, or not, we know nothing. That action is still pending, and I do not apprehend that the interlocutors against them have yet become final, so as to preclude them from appeal; but the Hospital say, 'We do not touch the question to be decided be-'tween Mr Maxwell and the parties proprietors of houses on the east 'side. We are very well satisfied with the decision thus far, that you, 'having the right of the dominant tenement, have the power to enforce 'this servitude against the parties on the other side of the street; but 'then we say, you ought not to retain your feu-duty against us, because

'you have a complete right of action, by means of the right you have May 23, 1826.
'acquired from us against those parties, and if you have, why are you to
'retain the feu-duty against us? We have nothing to do with enforcing
'this servitude. It is to be enforced, if at all, by you. The Court have
'told you that you are entitled to enforce it, and having told you that, it
'does appear to us, that it is a hardship upon us to say, that until this be
'done we shall be deprived of the feu-duty.'

My Lords, this is the mode of argument that is adopted by Heriot's Hospital; but still I thought myself bound to look at the case in this point of view: Suppose it should turn out ultimately, (not that I ought to trouble your Lordships with any opinion on that subject, nor shall I hint any doubt upon the subject,) suppose it should turn out that they had no right —that there is not this servitude as to the tenants on the other side—then I thought it proper to examine, what would be the result of your Lordships' judgment upon the subject of retaining the feu-duties. If you should say that Mr Maxwell has this right of servitude, which can be enforced against the parties on the other side of the street, it does not appear to me, that he would have this right to retain the feu-duties payable by him. If he were to say, 'You Heriot's Hospital, in conjunc-
'tion with other persons, have deceived me, by having lulled me into the
'belief, that these parties were not to build their houses above forty-six
'feet in height, and I have taken the charter upon that belief; and think-
'ing so, I did not call upon the Hospital to insert in their feu-charter the
'obligation, binding them that these houses should not exceed forty-six
'feet,' I apprehend still, his remedy would not be by the retention of the feu-duty, because it would not be a servitude to be enforced against the Hospital; but his remedy would be of a very different nature, for damages, in consequence of Heriot's Hospital, and the persons on the other side, having held out their intention not to build to a height exceeding forty-six feet; because the very ground of proceeding in this cause, on which the Court have held, that Mr Maxwell was entitled to call upon the other parties to reduce the height of their buildings, is, that there was this servitude, which servitude had passed to Mr Maxwell by means of his feu-charter. But then the respondents say, 'There being that servitude an-
'nexed to this property, and Heriot's Hospital not having enforced it,
'in conjunction with the other parties who have built houses on the
'other side not confining their houses to that limit, therefore it is our
'right to retain the feu-duty until the servitude against the persons on
'the other side is enforced.' But the Court have found, that they have this servitude, and that they are entitled to enforce it, without the intervention of Heriot's Hospital, against the inhabitants of the other side of the street; and, therefore, if the present decision is to stand, Heriot's Hospital having done all that was necessary for them to do, to confer the right upon Mr Maxwell to enforce this servitude against the other property, Mr Maxwell has no right to retain the feu-duty. If, on the other hand, he has not that servitude, it is extremely difficult to see upon what ground Mr Maxwell could retain the feu-duty, whatever other right he

May 23, 1826. may have against the Hospital to enforce that stipulation against the inhabitants on the east side of the street, which, he says, operated very much upon his mind when he entered into the contract with Mr Wallace for the purchase of this house.

My Lords, in considering this case, I was bound to look at it with even more than usual attention, inasmuch as no one appeared to support the decision, because your Lordships are well aware, although no one appears to support the decision appealed against, your Lordships cannot thereby necessarily infer that that decision is wrong. There is always a duty to consider whether it be right or wrong, as well where the case is argued by counsel as where it is not; because otherwise your Lordships might reverse that, as wrong, which was a perfectly correct decision. Your Lordships would not presume that the Court below had decided wrong; but when nobody appears to support the appeal, your Lordships do not enter into any discussion, whether they have decided right or not—your Lordships then affirm, without any consideration of the merits of the case, or the illegality or impropriety of the decision pronounced. But it is otherwise where the appeal is brought, and no party appears to maintain the judgment, because your Lordships will not presume that the decision is wrong until that is shown. Your Lordships will therefore take care not to set aside a decision, unless you think that it is wrong. In this case, all that the Hospital complains of is that part of the interlocutor which finds Mr Maxwell is entitled to retain the feu-duties; and nothing I have said here—if it should be communicated to the Court below—ought to have the least effect upon their judgment, as between the other parties. I have been most anxious to guard myself against expressing the slightest opinion whether that is right or wrong. On the contrary, perhaps your Lordships ought to assume it is right, more especially as the Hospital founds upon that decision: They say, 'You having held that Mr Maxwell has a right, with respect to the dominant tenement, to enforce the servitude in question, a fortiori we ought to be relieved against that part of the judgment that entitles you to retain the feu-duty. We have granted a charter upon due payment of the feu-duty in question, and we have not stipulated that we will enforce that servitude against the other tenants; but we have given you the power of enforcing it, and the Court say you have the power, and therefore it is inconsistent with that finding to compel us to abstain from receiving the feu-duties, and so entitle Mr Maxwell to pocket the feu-duty until he has enforced that right against the other parties, which he has already established.' If that should be the opinion of your Lordships, you should preface your judgment with a declaration, that Mr Maxwell is not entitled to retain the feu-duties due from him to the Hospital, as found by the interlocutors complained of; and therefore reverse the interlocutors complained of, so far as the same are inconsistent with this declaration. The cause must be remitted to the Court of Session, to proceed with it as to the other parties; and before I propose that judgment to your Lordships, I will consider the precise terms in which the judgment should be framed, in

order that your Lordships' intention in regard to these interlocutors may be carried into effect, and that there may be no mistake in the Court below; but the result will be, to reverse the interlocutors, so far as they are inconsistent with this declaration. May 23, 1826.

Appellants' Authorities.—2 Ersk. 9. 33.—Brown, May 14, 1823. (2 Shaw and Dunlop, No. 277. p. 298.)

SPOTTISWOODE and ROBERTSON, Solicitors.

No. 26.

Sir JAMES CAMPBELL of Ardkinglass, Bart. Appellant.—*Lushington—Keay.*

Madame L. TALINE SASSEN and W. M'KENZIE, W. S. Respondents.—*Jas. Campbell—Robertson.*

Husband and Wife—Aliment—Personal Exception.—Held (reversing the judgment of the Court of Session), 1. That a woman having failed to establish a marriage, —which she alleged was constituted by certain written documents, in which she was recognised as the defender's wife,—was not entitled to found on them to the effect of obtaining a permanent aliment during her life, she being fully aware that they had been given not intuitu matrimonii, but for another purpose, and not alleging that she had been seduced; and, 2. That it is incompetent to award interim aliment in a declarator of marriage resting on the mere allegation of the pursuer, and while no evidence of the marriage has been produced.

May 23, 1826.
1st DIVISION.
Bill Chamber.
Lord M'Kenzie.

IN 1817, Madame Lina Taline Sassen raised an action of adherence and aliment against Sir James Campbell, stating, that 'in the month of May 1804 she was married to the said Sir 'James Callender, otherwise Campbell, and now designing himself Sir James Campbell of Ardkinglass, at St Germain-en-'Laye, near Paris, and thereafter they lived and cohabited together as husband and wife, and there were several children 'born of their marriage, one of whom is still in life.' The summons then stated, that Sir James had deserted her, and concluded that he ought to be decerned 'to adhere to and cohabit with, 'treat, and entertain the pursuer in all respects as his wife, and 'to discharge all the duties incumbent on him as her husband; 'and, in case of his non-adherence,' be decerned and ordained 'to pay to the pursuer the sum of £300 sterling of yearly ali-'ment, and that in advance, at two terms in the year,' &c.

With this summons, she produced a power of attorney, granted in her favour by Sir James, dated Paris, 23d June 1808, in contemplation of her going to Scotland on business, in which

May 22, 1826. he was interested. The letter of attorney stated, 'That I, James 'Callender of Craigforth (his former designation), Stirlingshire, 'kingdom of Scotland, have nominated, made, constituted, and 'appointed, and by these presents do nominate, make, consti- 'tute, and appoint my beloved wife, Lina Taline Sassen, my 'true and lawful attorney, hereby giving and granting to her 'full power,' &c. She also produced a letter, dated 28th December 1809, addressed to her as Mrs Callender of Craigforth, after her arrival in Scotland, by Sir James, then in France. It was in these terms:—'I received yours, my dear 'Lina, on the 18th of October, and was very unhappy to find 'you had been so long ill, and have made so disagreeable a 'journey. I have this day got yours of the 22d of Novem- 'ber. I make no doubt, as you say, things will at last go 'well, and I approve of all your proceedings. I have only to 'repeat, pay attention to my affairs as you have done hither- 'to, with prudence, slowness, and circumspection. The more 'affairs of a family are complicated, the more the above con- 'duct is needful; and in all the information you require ap- 'ply to George (Sir James's son), Dundas, Davidson, and B. 'Campbell, because they are all men of good sense and the 'highest honour. I received your letter of the 18th of October, 'which I answered by Mr Mountflorence, addressed to Mr 'Adams, which I hope you have received, and I beg you will 'pay attention to the contents. Our brother and sister occupy 'her house here at present. I hope your present situation will 'go on well. Take care of yourself, and observe, from our fa- 'mily affairs, it is of consequence to you to lie in where you 'are. In my next letter I will send you an order for what 'money you will require for some time. If you was not so 'far from me, I should be angry with you, for not telling 'me in either of your two letters any particulars of George, 'James, or Randall. Give them my warmest blessing, I love 'them more than they can love themselves. Tell me every- 'thing about my daughters. Are George's children pretty? 'Who are they like? I hope like him in everything. My best 'wishes to my brother John Campbell. I shall conclude, be- 'cause I shall write to you very soon indeed, and send you the 'draft I mentioned. It will take some time to recollect the 'points you asked me. Therefore let all family affairs rest until 'you receive my next. May God bless you, yours most affec- 'tionately, 'J. C.'

Subjoined to this letter, was another, from Mrs Eliza Callen-

der (the wife of Sir James's brother, and who, with her husband, May 23, 1826.
was then on a visit to Sir James), in these terms:—'My dear
'sister, I was sorry to find upon my arrival here you was gone,
'and that your journey had been so bad. I hope you are quite
'recovered. I found my brother in good health and spirits. We
'see him very often, I brought the gown I wrought for you; my
'brother will take great care of it till you return. When you
'write give me a few lines. I suppose you have seen all our
'friends in Edinburgh. Give my best love to Mrs Kenneth
'Callender, and Mrs Flint, and all their children. If you will
'call upon my mother she will be very happy to see you; she
'lives in James's Court, in the Old Town. I wrote to her by
'Mr Mountflorence. The Colonel joins me in best love to you.
'Believe me, my dear sister, yours affectionately,' &c.

In evidence of her reception in Scotland, as his wife, she referred to a letter, addressed to her as Mrs James Callender, from Sir James's brother, in these terms:—'My dear madam,
'—I intended having the pleasure of writing to you, long be-
'fore this, in answer to your kind favour; but hearing by Mr
'Mountflorence, that your husband was expected in London,
'I delayed writing, but there is now no appearance of this
'happiness. No doubt the time is hastening to this desirable
'visit, and to remain in his own country. I am glad to hear
'matters are better than others told you. I hope you are now
'at Craigforth, and that your son-in-law is kind to you, as he,
'I am certain, is a man of honour. My family were happy
'to hear from you, and beg their assurances of friendship. I
'have nothing more to write you, not being in the gay world,
'and public matters are very bad; pardon this short letter. I
'will be glad to hear from you and how you go on and succeed.
'I am, dear madam, your affectionate brother.'

She also founded on a paragraph of a letter, addressed to her as Mrs Campbell, and written by a daughter of Sir James's brother-in-law:—'Saturday evening,—My dear madam, as I
'did indeed sympathise with you in your distress when we met
'last, I rejoice to find by your letter that you are in better
'spirits, and I trust, health too, which, I am very sure, hearing
'from your husband must greatly contribute to.'

She likewise referred to a letter from Sir James's son, addressed to her, and having prefixed to it, on the same sheet, a copy of a memorial relative to the estates of Craigforth and Ardkinglass, and a copy of a letter from the late Honourable Henry Erskine, the father-in-law of Colonel George Cal-

May 22, 1826. lender, addressed to 'Mrs Callender,' as acting in matters relative to those estates, under Sir James Campbell's power of attorney 'for her husband's family,' dated Prince's Street, 21st November 1808. Mr Erskine's letter was in these terms: —'Madam,—Although Colonel Callender and myself have already submitted to the consideration of Mr Clerk, the counsel chosen by yourself, everything necessary to form a full opinion on the merits of the Colonel's right to the estate of Craigforth, yet, being desirous of possessing you with the means of making your case known to any other man of business you may apply to on the subject, I enclose you, at Colonel Callender's desire, a memorial, containing a full and precise statement of all the proceedings that have taken place relative to the business. As this measure has been adopted from a sincere desire to convince you of Colonel Callender's readiness to afford you justice, and to save you from trouble and expense, permit me to hope that you will avail yourself of the opportunity given you of satisfying your mind, by resorting to legal opinions of such respectability as to avoid the risk of involving yourself in any measures tending to create unnecessary trouble and expense, either to yourself or your husband's family, which I should regret more on your own account than on theirs, feeling as I do for your situation. I remain,' &c.

She also produced an agreement entered into in August 1815, between Sir James and his son Colonel Callender, relative to his estates in Scotland, in which there was inter alia this article: —'In the third place, the said George Callender hereby becomes bound to pay to the widow of the said James Campbell, in case he shall leave a widow, the sum of £300 Sterling, of yearly life-rent annuity during her life, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first half yearly payment at the first of these terms that shall happen after the death of his said father, with one fifth part more of liquidate penalty for each term's failure in payment of the said annuity, and the legal interest of the same from the respective terms at which the same become due during the not payment; and the said George Callender binds himself and his foresaids to pay to the lawful child or children, if his father shall leave any such by such widow, the sum of £1500,' &c.

She founded, also, on a letter, addressed 'A Madame Madame Campbell, Hotel de Londres, Rue de L'Echiquier, Paris,' dated 18th May 1815, written to her by Sir James, saying that—'I have this moment, my dear, received yours, and I make haste to an-

'swer it, as you tell me your money is done; I knew the people May 23, 1826.
'where you now are long ago; they are very worthy people;
'and I have, since the peace, sent many strangers to their hotel.
'I send you a small bill for £35. I know Mr Murril has con-
'nexions on the coast; give it to him, and he will forward it to
'Messrs Latham, Price, and Company, Dover, or anybody else
'he pleases, and you will thus receive the amount in a very
'short time. I shall bring your baggage with me, when I come
'to town; but business of moment will keep me here a week
'longer. Yours in haste, 'JAMES CAMPBELL.'

And lastly, she produced a letter, dated 26th August 1816, written by Mr Ferrier, W.S. Sir James's agent in Scotland, to M. Moran, avocat at Paris, in answer to one which he had written on her behalf. He there stated—'I hold no funds at pre-
'sent; and if I did, I would not consider myself at liberty to
'pay one shilling thereof to Lady James Campbell, without his
'authority. The agreement between Sir James and his son Co-
'lonel Callender did not stipulate any sum to be paid to Lady
'Callender; but a sum was stipulated to be paid to Sir James
'himself, to enable him to clear his debts on the continent; and
'I understand the said sum was paid to him accordingly. The
'agreement stipulates a jointure of £300 a-year to his lady at
'his death, being the whole and the only interest she has there-
'in. The child is to have a provision of £1500, and is placed
'under the guardianship of her uncle Major Callender.'

Sir James, in defence, denied the assertion of the pursuer, that there had been a marriage; and he stated, that she had from her early years lived in a state of prostitution; that they had become acquainted in a brothel in Rue Mont Blanc, in Paris; that she was registered in the books of Police as such; that she came to his house as a servant, and thenceforth lived with him as his mistress; that no marriage between them was celebrated at St Germains-en-Laye (in support of which assertion he produced certificates from the curate and mayor of that place), nor elsewhere; that she knew that she was not his wife; and that the power of attorney was given to her merely to enable her to execute some important business in Scotland, as he could not go there at that time on account of the war; and lastly, that having complained to the Police in Paris, of the vexations which he experienced daily from her pretending to be his wife, and extorting money from him, she was called before it; that she there produced a piece of ragged paper, setting forth that in 1804 her marriage had been contracted at St Germains-en-Laye, and celebrated by a Protestant minister, assisted by two witnesses,

May 23, 1826. but that the Chief of the Protestant worship in France having testified that he never had a Protestant minister at St Germains-en-Laye, and that the name in the paper was totally unknown to him, she was ordered to cease taking in future the name and title of spouse of Sir James Callender Campbell; and that a promise having been made that influence would be used with Sir James, to give her assistance in money, and he having done so, she signed a receipt by her own name of Sassen.

On seeing these defences, she petitioned the Commissaries to be allowed to amend her libel, by adding to the narrative, that the parties had owned and acknowledged themselves, both verbally and in writing, to be married persons, and were habit and repute husband and wife, and as such, were owned and considered by their friends, neighbours, and acquaintances; and to conclude, that it should be declared that the parties 'are lawful 'married persons, husband and wife of each other; and that the 'child procreated of the marriage is a lawful child:' and she also prayed for interim aliment of £300 per annum and bygones for two years.

The Commissaries allowed the amendment, and decerned for £200, on account of aliment generally; but refused to modify a specific sum of interim aliment, at a fixed rate per annum: and thereafter, in respect Sir James was a native of Scotland, and proprietor of an entailed estate in Scotland, they sustained their jurisdiction, and ordered a special condescendence of the grounds of the action.

The pursuer accordingly lodged a condescendence, in which she averred that she was of good and honourable birth; that she had been married to Sir James by a Protestant clergyman at St Germains-en-Laye, but had lost the certificate; that Sir James had assured her, that the marriage was good according to the laws both of France and Scotland; that they had afterwards cohabited for many years as man and wife; that their children were recognised as lawful children; and, in support of these allegations, she referred to the above documents. Sir James repeated his former statements, and maintained, that the law of the residence was the rule in regard to the constitution of marriage; that by the law of France no acts of acknowledgment or declaration, without certain prescribed formalities, could constitute marriage; and that the pursuer knew well that the parties never had been married, nor ever proposed marriage.

The Commissaries having appointed the pursuer to state what she averred to have been the law of France at the date of the alleged marriage, with regard to the constitution of that con-

tract, she admitted that she was not in a condition to prove a French marriage; but now averred that she had cohabited in Holland with Sir James as his wife for above a twelvemonth, in the years 1812 and 1813; and that behaviour and cohabitation is by the law of that country as effectual as marriage formally celebrated. May 28, 1826.

She then proposed, and was allowed of new, to amend her libel thus:—'In the event of its being found that the pursuer is 'not lawfully married to the said James Callender, otherwise 'James Campbell, now designing himself Sir James Campbell 'of Ardkinglass, the pursuer ought to have our sentence and de-'cree declaring and ordaining him, the said defender, to make 'payment to the pursuer of the sum of £5000 Sterling, or such 'other sum, less or more, as shall be ascertained in the course of 'the process, in name of solatium or damages, on account of the 'gross imposition and fraud committed by the said defender in 'leading her, the pursuer, to believe she was lawfully married; 'or at least, that the declaration, consent, and cohabitation of 'the pursuer and defender, as man and wife, would make a legal 'and sufficient marriage by the law of Scotland (where his pro-'perty was situated), and continuing the same fraud and impo-'sition, by executing formal and important deeds, one or more, 'wherein she, the pursuer, is expressed, designed, and declared to 'be, and published to all as his, the defender's, wife; and further, 'by repeated declarations of the defender to many persons in 'France, Holland, and Scotland, that she, the pursuer, was his, 'the defender's, lawful wife; lastly, and in any event, the pur-'suer ought to have our sentence and decreet.'

The Commissaries having allowed a proof as to the new allegation of a marriage in Holland, and the law of that country; and the proof having been reported, they found that the pursuer 'has failed to establish the constitution of a marriage betwixt 'the parties, either in France or in Holland, according to the 'laws of those countries at the period to which her allegations 'relate; but ordain the parties to give in memorials on the point, 'whether the pursuer is nevertheless entitled to found upon the 'written evidence in process as proof of the constitution of a 'marriage betwixt the parties in Scotland, by any form known 'in the law of this country, or as founding a right to aliment 'in the event of her failure to establish her conclusion for mar-'riage; and under this latter head, particularly to examine the 'authorities and precedents applicable thereto.'

Thereafter, on advising the memorials, the Commissaries found that the evidence adduced in behalf of the pursuer 'is not

May 23, 1826. 'relevant to infer marriage betwixt the parties, and therefore 'assoilzie the defender from that conclusion of the libel; but 'find that in a letter of attorney granted at Paris, by the de- 'fender to the pursuer, and dated the 23d day of June 1808, 'he styled her my beloved wife Lina Taline Sassen, and gave 'her unlimited powers to act for him in that character: That 'accordingly she came to this country, invested by him with 'the apparent character of his lawful wife, and was so received 'and acknowledged by his nearest relations in their correspond- 'ence with her, and in the most important transactions relative 'to the affairs of the defender and his family, as, inter alia, ap- 'pears in particular from a letter dated London, 20th Decem- 'ber 1809, which is holograph of his eldest son, Colonel George 'Callender, and addressed to his father, the defender, with a 'copy prefixed thereto on the same sheet, as a memorial relative 'to the estates of Craigforth and Ardkinglass, and also a copy 'prefixed of a letter from the Honourable Henry Erskine, fa- 'ther-in-law of Colonel George Callender, addressed to "Mrs 'Callender," the pursuer, as acting relative to these estates, 'under the defender's power of attorney, "for her husband's 'family," and dated Prince's Street, 31st December 1808; 'also from a letter addressed by the defender to "Mrs Callen- 'der of Craigforth, No. 1, St Andrew's Square, Edinburgh," 'bearing date 28th December, and having the post mark, "M. 'R. 6, 1809, foreign letter," in which he declared that he "ap- 'proved of all her proceedings;" and, among other acknow- 'ledgments of her as his wife, said to her, "I answered your 'letter of the 18th January, by Mrs Mountflorence, addressed 'to B. R. Adam, which I hope you have received, and I beg 'you pay attention to the contents; our brother and sister 'occupy her house here at present," with a letter subjoined 'thereto, from the defender's sister, Eliza Callender, in which 'she styled the pursuer "my dear sister," and said, inter alia, '"I brought the gown I worked for you; my brother will take 'great care of it till your return. When you write, give me 'a few lines. I suppose you have seen all our friends in Edin- 'burgh. Give my best love to Mrs Kenneth Callender and 'Mrs Flint, and all their children. If you will call on my 'mother, she will be very happy to see you," &c. Also, from 'another letter of the defender, who then styled himself Sir 'James Campbell, to the pursuer, addressed by him on the back '"—A Madame Madame Campbell, Hotel de Londres, Rue de 'L'Echiquier, Paris," and dated 18th May 1815, in which he

'wrote to her in terms of similar affection and confidence. Al- May 28, 1824.
'so, from a letter from John Ferrier, Esq. writer to the signet,
'dated Edinburgh, 26th August 1816, and addressed, "J. H.
'Moran, Esq. No. 25, Rue de Hotel Dauphine, Paris," in
'which Mr Ferrier, as the agent of the defender, said to Mr
'Moran, the pursuer's agent—(Here the letter was quoted.)—
'As also, from an extract of the said deed of agreement betwixt
'the defender and his son, Colonel George Callender, dated the
'15th day of July, and 5th August 1815, produced from the
'record, which contains, inter alia, the provisions above refer-
'red to, and likewise secures to the defender a free annuity
'of £1000 per annum: That the allegations of the defender
'are not relevant to elide the inferences arising from the writ-
'ten evidence, in support of the remaining conclusions of the
'pursuer's libel, nor credible in opposition to his own letters.
'Therefore, in the whole circumstances of this case, and in con-
'formity to the judgment pronounced by the Court of Session
'in the case of Lyon against Gordon, 20th July 1699, and by
'this Court in the case of Margaret Drummond against Sir
'Alexander Hope, on the 2d August 1744, and other analogous
'authorities, find the defender bound to aliment the pursuer,
'Lina Taline Sassen, all the days of her life, from and after the
'5th day of February 1819, when the pursuer lodged the amend-
'ment of her libel, claiming a solatium or damages, in case of
'her failing to establish a marriage with the defender; and,
'with reference to the amount of the defender's annuity of
'£1000, modify the pursuer's aliment to the sum of £300
'Sterling per annum, payable quarterly from that date, with
'the legal interest thereof, but deducting such sums as the de-
'fender has already paid to account: Find the defender also
'liable to her in expenses of process, of which allow an account
'to be given in, and decern.'

Both parties advocated, and the Lord Ordinary having reported the case on memorials, the Court, on advising them, appointed a hearing; and thereafter sisted procedure, until a supplementary action relative to the claim of aliment should be raised by the pursuer before the Commissaries.

The Lord President observed, in reference to the merits—I can find no authority in support of the possibility of a marriage, where one of the parties is in this country and the other is out of it. It is true, that by the principles of our law mutual consent is sufficient, but I cannot venture, where there is no precedent or authority for it, to say that marriage may be constituted under

May 23, 1826. such circumstances. The principles of international law, besides, present great difficulties.

Lord Hermand.—This is a most important question, and it must be decided on general principles. The prevailing rule is, that contracts must be construed according to the law of the domicil. France must here be considered as the domicil of the parties. Sir James conveyed away his estates in Scotland, and he has resided in France since 1792. The pursuer has not proved a marriage in France. She now betakes herself to the letter of attorney, and to the law of Scotland. Independent of that letter and the correspondence, she has not even a pretence for alleging marriage. But it is impossible that she can say that she received that letter on the faith that she was thereby constituted the wife of the defender. It was granted for a different purpose altogether, and in France it could not make her his wife. When she left that country, therefore, she was unmarried, and she was so when she came to England; but she pretends that at the moment when she put her foot on Scottish ground she started up Lady Campbell. This, however, is absurd. The letter of attorney was a French deed; it was delivered in France; and it must be interpreted by the law of that country; but it is admitted on all hands that there it is ineffectual to make a marriage. Besides, the consent must be given intuitu matrimonii, whereas the designation of wife was applied to her not with that view, but to enable her the more easily to execute the business for which she was sent to this country.

With regard to the claim of damages, I rather think it rests on different principles. There has certainly been no seduction; and there is no allegation to that effect. But in the whole circumstances, I think some aliment is due. I cannot, however, agree that she should be allowed so much as has been awarded by the Commissaries. If she had been a virtuous woman, they could scarcely have given her more; and even as his widow she would not have drawn a larger allowance.

Lord Balgray.—I am not surprised that in the peculiar circumstances of this case the pursuer's legal advisers had some difficulty in framing the summons. It brings before us two questions; 1st, Whether Sir James is bound to adhere to the pursuer as his lawful wife; and, 2d, Whether he is bound to aliment her.

On the first of these points I shall say very little. The principles by which it is to be decided have been fixed by the cases of M'Innes, Sheddan, &c. It is no doubt true that consent constitutes marriage, but that consent must be deliberate, mutual, and

given at one and the same time. These qualities do not exist here. The deed was executed in France, and the consent expressed in it was to constitute the pursuer the attorney of the defender, and not for the purpose of marriage. Therefore the allegation of marriage may be thrown aside. May 23, 1826.

The second conclusion is for aliment or damages, and it is rested on averments that Sir James had been guilty of fraud and deception in making the pursuer believe that she was his lawful wife. This therefore depends on fact, and of which a proof must be allowed, unless we are of opinion that there is sufficient before us to decide the case. If a proof at large were allowed it would be ruinous to both parties, and I have therefore been anxious to avoid it, and I think we can do so. In this question we are untrammelled by the principles of international law. All we have to do is to look at the documents before us, and to consider their effect as giving a claim of damages by the law of Scotland. Now, I apprehend, that if Sir James had died and the pursuer had claimed terce as his widow, these documents would have warranted a jury in serving her. Or suppose a legacy had been left to her, I conceive Sir James would have been entitled to payment of it jure mariti on exhibiting these letters. *She* could not have denied effect to them. Therefore these documents are important in considering the present question. But farther, the parties lived together from 1804 till 1816—she behaved irreproachably during that time—had a family by Sir James—was acknowledged by all his relations as his wife—and was intrusted by him under that character with extraordinary powers. I therefore apprehend that she is entitled to demand aliment from him. Now, what is the defence? He says that all the papers were framed for the purpose of deception. But can we listen to such a statement from him? Certainly not. Perhaps there may be some objections to the summons in point of form; but I think as justice is with the pursuer, we ought to sist process till a supplementary summons is brought by her.

Lord Succoth.—I am much of the same opinion, on similar grounds.

To constitute marriage by the law of Scotland consent alone is necessary; but that consent must be deliberately given by both parties eo intuitu. If either of them have any other purpose in view than that of marriage, and this be clearly established, then the consent will not be of that nature which is required by law. If this doctrine be well founded, there is an end to the conclusion for adherence. The purpose of granting the letter

May 23, 1826. of attorney and allowing the pursuer to assume the character of Sir James's wife, was not to constitute a marriage, but to enable her the more effectually to transact his affairs in this country. Besides, the letter of attorney is a French deed, although, no doubt, it was to be executed in Scotland. But in judging of it we must be governed by the law of France, by which it is unavailing to constitute marriage. The correspondence in like manner took place, not to create a marriage, but in reference to the purposes of the letter of attorney, and to maintain that deception which was thought necessary in the circumstances in which Sir James was placed.

On the question as to the claim of damages I agree entirely with Lord Balgray, and when it is brought before us in proper shape she will be found entitled to it. There is, however, no pretence for alleging seduction.

Lord Gillies concurred.

A supplementary action, ob contingentiam of the former action, was accordingly raised and brought into the Court of Session. After a recital of the facts and circumstances already detailed, it stated, 'That although the pursuer should fail in esta-'blishing a legal and valid marriage to subsist between her and 'the said defender, and although she should fail to prove that 'at the commencement of their connexion, the defender com-'mitted a gross fraud and imposition by leading her, the pur-'suer, to believe that she was then lawfully married, or that 'the declaration, consent, and cohabitation of the pursuer and 'defender, as man and wife, would make a legal and sufficient 'marriage by the law of Scotland, all as stated in her former 'summons and amendments thereof aforesaid, still the defender 'would, by his subsequent acts and conduct, be liable to the pur-'suer in damages: In so far as he, the defender, for many years 'received, treated, and acknowledged the pursuer as his lawful 'wife, and had the children procreated of their bodies during 'this intercourse publicly baptized as his lawful children, and 'afterwards acknowledged them in that character. In particular, 'the defender, in various deeds and instruments, owned and ac-'knowledged the pursuer as his lawful married wife; and more 'especially, he styled and designated the pursuer as his wife in 'the letter or power of attorney before-mentioned, and in the 'letter of the 28th December 1809, before recited, which is ho-'lograph of the said defender, and by him addressed to the pur-'suer; and in the contract of agreement between him and his 'son Colonel George Callender, the defender made provision

'for the pursuer as his widow in case he should predecease her, May 23, 1826.
'and also for the child or children procreated of their bodies
'who might be alive at the time of his death, as his lawful chil-
'dren. Farther, the defender introduced the pursuer to the
'public and to his friends and relations as his lawful wife; and
'the pursuer was received, owned, and acknowledged as such
'by the friends, relations, and men of business of the defender,
'and by the public in France, in Holland, in England, and in
'Scotland; in particular, the pursuer was so received, owned,
'and acknowledged by the persons, and in the letters and do-
'cuments before specified; to all of which writings, and to other
'writings and documents which will be produced in the pro-
'cess to follow hereon, reference is hereby had, and they are
'here held as repeated brevitatis causa. That by the acts and
'conduct aforesaid of the defender, and the consequent beha-
'viour of his friends and relations, and others, the pursuer was
'induced to believe, and did believe, that she and the defender
'were lawful married persons, husband and wife, and that she
'was entitled to all the rights, privileges, and benefits of a law-
'ful married wife: That thereby, and by the defender desert-
'ing and abandoning the pursuer as aforesaid, and denying
'that he and the pursuer are lawful married persons, husband
'and wife, the pursuer has suffered great loss, damage, and in-
'jury, for all which the defender is liable; and the defender is
'now legally bound to support, aliment, and maintain the pur-
'suer during all the days of her life, in a manner suitable to
'his own station, and to the rank in which he placed the pur-
'suer, and to which he made her believe that she had a legal
'title.'

The Court thereupon remitted 'to the Lord Ordinary to re-
'mit to the Commissaries, with instructions to them to adhere
'to that part of their interlocutor of 9th March 1821, which
'finds that the evidence adduced on the behalf of the pursuer
'is not relevant to infer marriage betwixt the parties; and also
'so far as it finds the defender liable in aliment to the pursuer:
'but to alter the same in so far as to find the pursuer entitled
'to an aliment of £200 per annum only, payable to her quar-
'terly all the days of her life, deducting such sums as have al-
'ready been paid to account'—with expenses. And in the sup-
plementary action they remitted, 'to find the pursuer entitled
'to an aliment of £200 yearly, payable quarterly, all the days
'of her life, and commencing the 5th day of February 1819,
'when the pursuer lodged the original amendment of her libel
'in the Commissary Court, claiming a solatium or damages in

May 23, 1826. 'the event of her failing to establish a marriage with the de-
'fender, deducting such sums as have been paid to account
'thereof; and to find expenses due.' And to this judgment the Court, on advising a petition by the defender, unanimously adhered on the 22d June 1824,* and allowed execution pending appeal, as to this permanent aliment, without caution.

In the course of these proceedings, various applications had been made to the Commissaries for interim aliment, and granted; and Sir James having complained by advocation, the Court of Session adhered, with expenses.

Against these interlocutors Sir James appealed. Madame Sassen made no appearance; but a Case was lodged, and counsel appeared for William M'Kenzie, who had become cautioner under an application for execution, pending appeal, to repay the interim aliment granted in the course of the process, and expenses, in case of a reversal.

Appellant.—The documents produced do not instruct the allegations, on which the pursuer claims aliment. The appellant's counter averments are relevant, and destructive of the claim; and there is in their nature no reason why he should not be permitted to prove them. The first summons was an action of adherence, but the amendment converted it into a declarator of marriage. Under it, however, there could be no aliment found due until decree of marriage had been pronounced. Then came the third amendment, and claim for a solatium and damages, resting on the alleged deceit practised by the appellant on the pursuer, in making her believe either that she was married, or would be so by the law of Scotland. But, even if there could be alternatives in the allegation of imposition, these alternatives destroy themselves; and, supposing either to be true, the pursuer does not give them relevancy by alleging seduction in consequence of that deceit. There is no relevancy in the charge of the supplementary action—no subsequent acts, short of celebration of marriage, can afford the pursuer ground for her claim. There can be no continuance of a deceit which has not been proved to exist previously. All that the pursuer can qualify, is, that she continued to assume the character which she knew to be false—which the appellant knew to be false—and which, as to third parties, was an imposition. Besides, all these averments must be proved, and the appellant has opposed to them the most po-

* See 2 Shaw and Dunlop, No. 175, and Vol. 3, Nos. 114 and 115.

remptory denial. There is no bar to the appellant's defence in May 23, 1826.
personalis exceptio. That exception only operates, where the individual complaining was ignorant of the deception, not when a party to it. The pursuer knew, when she went to Scotland, that she was not married. She has abandoned all pretence that she can establish marriage; and if she represented herself to the appellant's friends and relations as his lawful wife, she was guilty of a fraud. But it would be a singular mode of forwarding the interests of morality, to reward the offender, by shutting the mouth of the party resisting a demand founded on that fraud. According to her doctrine, a personal exception will allow a woman who has entered a house as a mistress, to go out as a wife, although no marriage has taken place. Besides, the same pretended exception ought to have proved a bar to pleading a defence to the marriage itself. But it did not. That there has been a fraud on the public, is no ground in a court of law for damages to a private party, who was a deceiver, and who was not deceived.

There was no ground for interim aliment. The instant the pursuer amended her summons, and converted her action into one of declarator of marriage, her claim for aliment ceased. No instance is on record where aliment has been given before a proof has been led in the declarator. Aliment is allowed only because, during marriage, the property of the wife passes under the dominium of the husband. Therefore, in an action where the fact of marriage is admitted, aliment is due. This is an onus that necessarily follows the status to which the husband has consented. But marriage must either be proved, or circumstances admitted sufficient to make a legal marriage, before aliment can be allotted; otherwise a woman might allege marriage, and enjoy aliment, until, after a protracted suit, the imposition was discovered. If a woman hold a written promise de presenti, and found on it in her summons of adherence, and the defender concedes that it is his letter, but alleges that it was given alio intuitu, in that case aliment ought to be given, because he admits what by the law of Scotland is a marriage, and tries to get the better of it by pleading a defence, which it is incumbent on him to establish. Again, if the woman alleges a regular Scotch marriage in kirk, which the defender admits, but says, that he is not her husband, because she has a prior husband alive; then aliment is due, because the onus of proving that allegation lies on the defender; and, in the meantime, he must pay aliment. If an opposite rule were adopted, and the mere statement of a pursuer were received, it would be in any woman's power to pursue any

May 23, 1826. person she chose, and thus obtain a temporary support. No one would be safe, married or not. But in the present case, the pursuer brought her action of declarator of marriage on the allegation that it had been regularly contracted at St Germains-en-Laye. In this she failed; and then she alleged a marriage in Holland; but in this she also failed. Now, although these allegations were denied, yet interim aliment was awarded to her. She then betook herself to the letter of attorney and correspondence, and law of Scotland, although she well knew that they were written not intuitu matrimonii, but for another object, which she now admits by abandoning all pretence of marriage. As interim aliment was therefore awarded only on the assumption that she was his married wife, and she well knew she had no title to that character, she had no right to demand it. In Lady Hawkes' case, where her name as a married woman was inserted in the passport, and in the Dalrymple case, no aliment, pendente lite, was allowed.

Respondent (*Mackenzie.*)—The parties lived together, and were received as man and wife. The appellant allowed the pursuer to take that character and status, and introduced her as such to his friends, and recognized her as such himself. The evidence afforded by the documents produced was sufficient to authorize a court to award aliment. It is no defence, that his whole conduct was a system of deception and fraud, and that he was deceiving both the pursuer and his own relations. She alleges she was seduced to continue to live with him on the faith that she was his wife; and there is no charge of misconduct after the acknowledgment. A personal exception, although incompetent in a question of status, may be competent in a question of aliment. By the law and practice of Scotland, aliment is due, though the facts proved do not ultimately turn out to amount to an effectual marriage; at least interim aliment, while maintaining a right to the status, is due; and the pursuer having, bona fide, received and consumed the sums paid, it would be most unjust to enforce a repetition of them from her surety.

The House of Lords, in the principal case, declared, 'That the 'respondent having failed to establish her marriage, is not entitled, under either of the summonses, to recover aliment or 'damages against the appellant, and, with this declaration, it 'is ordered and adjudged, that the said interlocutors, so far as 'they are complained of in the said appeal, and so far as they 'are inconsistent with this declaration, be, and the same are hereby reversed.'

In the question as to interim aliment, the House of Lords declared, 'That the respondent was not entitled to interim ali-'ment, and therefore it is ordered and adjudged, that the inter-'locutors complained of in the said appeal, so far as they are 'inconsistent with this declaration, be, and the same are hereby 'reversed.' May 23, 1825.

Lord Gifford.—My Lords, there are two appeals that come before your Lordships under similar circumstances. In one of them the respondent, in favour of whom the judgment was pronounced, not appearing to support that judgment; and in the other of them, a party did appear who had an interest in the judgment pronounced, and therefore contended for the validity of the judgment below, but the principal party did not appear. This is a case which will require some details, to state it clearly to your Lordships, and it is a case of some singularity.

I always experience great anxiety when I feel myself under the painful necessity of differing from the view taken of a case in the Court of Session; and if in any case, more particularly I feel it on the present occasion, because, when I state the various proceedings that have taken place in this case, your Lordships will clearly see, that the matter has been very much considered by the Court of Session. At the same time, if, after due consideration of the circumstances of the case, and the law, as applicable to them, I feel myself under the necessity, consistently with the duty I owe to your Lordships and to the parties, of differing from that decision, I ought not to hesitate in pronouncing that opinion, although it should differ from the opinion expressed in the Court below.

The appellant in this case is a gentleman, calling himself Sir James Campbell of Ardkinglass, in the county of Argyle; and the respondent is a lady of the name of Madame Lina Taline Sassen, who styles herself Lady Campbell, as spouse of Sir James Campbell of Ardkinglass. It appears that, many years ago, Sir James Campbell, or, as he was then called, Callender, being in France, contracted an intimacy with this lady, and continued to cohabit with her in France, and other parts of the continent, till 1815. In the year 1817 this lady came to Scotland, and Sir James Campbell having contended that he never had contracted a marriage with this lady, she instituted proceedings in the Commissary Court of Scotland, for the purpose of compelling him to treat her as his wife, she stating that she was his wife.

The first action was an action of adherence, which is an action founded on the allegation that a marriage has actually taken place between the parties, to compel the husband to maintain the lady as his wife, and discharge all the duties incumbent upon him as a husband; and in case of noncompliance, to decree aliment against him for support of the lady.

In this action of adherence, she founded her marriage on circumstances that had taken place at St Germains in the month of May 1804. Her allegation was, that 'the pursuer was married to the said Sir James Cal-

May 23, 1828. 'leader, otherwise Campbell, and now designating himself Sir James 'Campbell of Ardkinglass, at St Germains-en-Laye, near Paris, and 'thereafter they lived and cohabited together as husband and wife, and 'there were several children born of that marriage, one of whom is still 'in life;' and she concludes her summons with the requisition I have mentioned to your Lordships.

Defences were given in by Sir James Campbell, in which he denied positively the fact that any such marriage had taken place. I should have stated to your Lordships, that, in the summons, the lady referred to certain papers which she produced; one is a letter of attorney, dated Paris, 23d June 1808, in which the appellant describes her as his 'beloved 'wife.' Some letters also were lodged by her, in some of which it appeared that he addressed her by the name of Mrs Callender and Campbell, and treated her as his wife. Sir James Campbell, by his defences, denied the marriage; and he produced various documents to shew, that some proceedings had taken place in Paris upon the subject, and that there had been a certificate granted by the mayor of St Germains, stating that no marriage had taken place between the parties. In consequence of this defence on the part of Sir James Campbell the marriage was put in issue, and the question was, whether it was a marriage or not? The consequence was, that this lady was obliged to alter her course. An action of adherence is founded on the notion that the marriage had actually taken place, and if it be admitted by the defender, the cause then proceeds, and the Court determines whether he shall treat her as his wife or grant her alimony; but in consequence of this direct denial of the marriage, she was obliged to alter the form of action, from an action of adherence to an action of declarator, to have it declared that there was a marriage, and then to have it tried whether there was a marriage or not. She then petitioned for leave to amend her libel; and at the same time that she applied to amend her libel, she also applied for interim alimony of £200 per annum, with bygones for two years; she also applied, in the event of the marriage being established, that there might be a conclusion for alimony. Leave was given to her to amend her libel; and in consequence of that she amended her libel, by introducing a conclusion for a 'declara-'tor of her marriage, which (as she stated in her petition), in the present 'state of the process, is competent, and has been rendered necessary by 'the conduct of the defender himself, who, notwithstanding his cruel 'treatment of the petitioner, was not expected to go the length of deny-'ing her to be his lawful wife; and in order to have the amendment 'made, the petitioner humbly produces the same, and craves your Lord-'ships to admit thereof.' The proposed amendment consisted of the following addition to the narrative—(His Lordship here read it.)

In consequence of this allegation, the Commissaries pronounced an interlocutor, decerning for £200 to account of interim aliment generally; and they adhered to this interlocutor, on advising a reclaiming petition. The first appeal in this case has been brought against this interlocutor of the Court of Commissaries, allowing interim alimony. It may be proper

to state to your Lordships, that the libel having been amended, by introducing this conclusion for a declarator of the marriage, the cause went on, and proceedings were had as to this French marriage; and afterwards finding that she was likely to fail altogether in making out any French marriage, she then turned round, and said that there was a Dutch marriage, a marriage in Holland; that failed her also: then, upon some expressions which had dropped from some of the learned Judges in the course of that discussion, she took up another view, and said, although there were neither a marriage according to the law of France nor according to the law of Holland, yet by this letter of attorney, executed at Paris, in which Sir James Campbell had designated her as his 'beloved wife,' and by subsequent acknowledgments, this was a marriage good by the law of Scotland. That certainly involved a very difficult question, how far a Scotch marriage could be contracted in France, where parties must be married by the law of France. A very learned discussion took place upon that point among the learned Judges, and it was ultimately determined by them that there was no marriage, and consequently Sir James Campbell was assoilzied from that part of the action relating to the marriage. May 22, 1838.

My Lords, an appeal was brought by Sir James Campbell against this allowance of interim alimony, and that appeal was met at your Lordships' bar, by the appearance of a gentleman who had become cautioner for this lady, for the return of this alimony in case it should be found that she was not entitled to it. It is very true, that in an action of adherence, for instance, or in an action of declarator of marriage, if the marriage be admitted by the party complained against, the Court will decree interim alimony—that is, alimony to be paid to the wife before the final decision of the question; but it was contended at your Lordships' bar, that in an action of declarator of marriage, no instance could be found in which interim alimony had ever been allowed where the marriage was denied, and where proof of that marriage had not been given. It was admitted, that if, in this case, proof had been given of the marriage in France—that if a prima facie case of marriage had been established—the Court would, before the final decision of the case, award interim alimony: So they would, in an action of adherence, as I have stated to your Lordships, where the action proceeded upon the ground of a marriage not denied or disputed. But, my Lords, the irregularity of the case here was, that although the action was an action of adherence when this interlocutor was pronounced, yet at that very moment application had been made by this lady to change the proceeding to an action of declarator, expressly stating she had been met, to her great surprise, by a denial of the marriage by Sir James Campbell; and, therefore, being met by that, she could no longer proceed upon this action of adherence, but that it must be changed to an action of declarator. Notwithstanding this, she sues for interim alimony: and although that was the state of the cause—and although the marriage was denied—and although no proof was adduced of the French marriage contracted at St Germains—and although it was only an allega-

May 23, 1826. tion—yet the Commissaries awarded interim alimony to his lady, and the decision was confirmed by the Court of Session. It seems to me, that if interim alimony could be awarded in this stage of the cause (as was most forcibly put in one of the most powerful arguments I ever heard at your Lordships' bar, by Dr Lushington), any woman might be entitled to alimony against any man; because it was only necessary for a woman to come in and say, 'I am the wife of A. B., but before I enter 'into any proof upon the subject, nay, after the denial of A. B. that he is 'my husband, the Court shall, upon my mere allegation that there has 'been this status of actual relation between us, award me interim ali-'mony.' It seems to me, that if this position could be supported, it would necessarily follow, that the bare allegation of the mere circumstance of marriage would be sufficient to fix a man, an utter stranger to the party applying, with interim alimony, and to compel him to support the woman before the final decision of the question; he at the same time positively denying, and ultimately succeeding in proving, that there was no marriage—as was the case here.

My Lords, some cases were cited, but I think it was shown that these cases did not bear upon the present question. Because in those cases interim alimony might have been granted upon an action of declarator where there might be some doubt; but no instance could be adduced where it was given before proof was led, and before there was evidence before the Court sufficient to satisfy them that there was ground to believe that the marriage could be established between the parties. In this case, and at this stage of the cause, so far from there being evidence of that sort, this lady was obliged to abandon her action of adherence, and convert it into an action of declarator, upon the denial by Sir James Campbell that there was any marriage in fact, and it was not established. Upon this appeal, I must confess I have very little difficulty in advising your Lordships to reverse the interlocutors complained of. When I say reverse the interlocutors, I apprehend, considering the nature of these proceedings, and what may be necessary to be done in the Court below, that the safer course would be, to declare that this lady is not entitled to interim alimony, and to remit the case with that declaration, either to the Court of Session or to the Commissary Court, to apply that declaration.

My Lords, after this proceeding had taken place, and interim alimony had been awarded to her, the cause went on in the Commissary Court, and the Commissaries, in the month of February 1818, pronounced an interlocutor, by which they find, that the defender is a native of Scotland, and a proprietor of an entailed estate in this kingdom, repel the objection to the jurisdiction of the Court, and allow the action to proceed. Then they appoint a condescendence to be given in of the whole facts this lady offered to prove in support of the conclusions of her libel. It appears, that finding she could not establish a marriage according to the law of France, she then stated, that Sir James Campbell had cohabited with her as his wife in Holland, and that this cohabitation was sufficient by the law

of that country to constitute a marriage. Upon this new averment, the Commissaries directed the lady to deliver in a minute of the law of marriage in Holland in the years 1812 and 1813. May 23, 1826.

My Lords, after this, and while this discussion was going on, in relation to the law of marriage in Holland, she applied to amend her libel in other respects, to which I shall call your Lordships' attention. Her action was entirely confined to an action of declarator, that a marriage had taken place between her and Sir James Campbell, and she requested to amend her libel by adding a conclusion for £5000 of damages, on the ground of fraud and imposition. This amendment was allowed by the Commissaries. They had allowed her to prove her Dutch marriage; and they afterwards pronounced an interlocutor for additional interim aliment. They then pronounced an interlocutor, by which they find that she had failed to establish the constitution of a marriage betwixt the parties either in France or in Holland, according to the laws of those countries at the periods to which her allegations relate. Then they ordained the parties to give in memorials on the point, whether the pursuer is nevertheless entitled to found upon the written evidence in process in proof of the constitution of a marriage betwixt the parties according to the law of Scotland. So that this lady shifts her ground a third time, and resorts to the law of Scotland. Then the Commissaries, on advising memorials, found, that upon that part of her action the evidence adduced on behalf of the pursuer was not relevant to infer marriage betwixt the parties, and therefore assoilzied Sir James from that conclusion of the libel. That put an end to that part of her claim.—They had thus found that neither by the law of France, nor by the law of Holland, nor by the law of Scotland, had any marriage taken place between these parties; and then they went on to find, that the letter of attorney had been given by Sir James Campbell, in which he designates her as his wife, and that he introduced her by that title to several parts of his family, and that he addressed letters to her as Mrs Callender and Mrs Campbell; and therefore, in the whole circumstances of this case, and in conformity to certain cases to which they referred, they find that Sir James Campbell was bound to aliment this lady for all the days of her life, from and after the 5th day of February 1819, when the pursuer lodged the amendment of her libel, claiming a solatium, or damages, in case of her failing to establish a marriage with the defender; and with reference to the amount of the defender's annuity of £1000, modified the pursuer's aliment to the sum of £300 Sterling per annum. So that, although it is stated that she was not his wife—no legal marriage being established between them—yet, because he had represented her as his wife, and had introduced her as his wife, the Commissaries considered that Sir James Campbell (although not bound to pay the sum required by the conclusions of the libel) was bound to aliment her all the days of her life, and that it should be £300 per annum. The case was then brought before the Court of Session; and the Court of Session, after the case was stated at very great length by both parties, were, upon the finding in respect of the marriage,

May 23, 1826. and also the aliment, of opinion that the Commissary Court had decided rightly, by those interlocuters which are brought by appeal before your Lordships. The question as to the marriage was set at rest, for the Court thought that point could not be sustained. But the Court of Session, viewing, as any other person would, the conduct of Sir James Campbell as most dishonourable—for although he had not contracted marriage, (I add nothing of the attempt to throw discredit upon the character of this lady, that she was a prostitute in Paris and other places for many years,) the Court of Session say, it was most disgraceful that he should have introduced her, and more disgraceful if she were what he described her to be, to his friends in Scotland as his wife. The Court thought that he having so represented her, they could not allow him to plead his own fraud; and although they seemed to feel the difficulty of having fixed him with this alimony, under the amendment of the libel in the Commissary Court, yet they appear to have thought, and they intimated that probably some other action, in the nature of a supplementary action, might be raised, upon which the question might be more properly brought before them, and in which they might decree damages in the shape of aliment for all the days of the pursuer's life.

In consequence of that suggestion, a supplementary action was raised; and it is important to call your Lordships' attention to the terms of that supplementary action. It sets out the former action and the proceedings, and the judgments that had been given for aliment, and then it proceeds to state, that the Court had directed the supplementary action; and then the lady goes on in this way: that although she should fail in establishing a legal and valid marriage to subsist between her and the defender, and although she should fail to prove, that, at the commencement of their connexion, the defender committed a gross fraud and imposition, by leading her, the pursuer, to believe that she was then lawfully married, and so forth, still the defender would, by his subsequent acts and conduct, be liable to the pursuer in damages.

My Lords, this supplementary action having been raised, the question came before the Court of Session, and they pronounced an interlocutor, by which they remit to the Lord Ordinary to remit to the Commissaries, to adhere to the interlocutor, in so far as it finds no marriage established, and so far as it finds aliment due; but to alter the same so as to restrict the aliment to £200 per annum; to find no marriage, but to allow £200 of yearly aliment. Now, my Lords, I feel a difficulty in understanding precisely the interlocutor pronounced; and I shall tell your Lordships why.

This judgment confirms the interlocutor of the Commissaries, pronounced before the supplementary action was raised. By that interlocutor, the Commissaries determined under the second amendment of the libel, with respect to the claim for £5000, that Sir James Campbell was not liable in any gross sum in damages, but the sum of £300 to aliment her for life. The Court of Session seem to have thought that it was difficult to support that finding, and they therefore directed a supplementary

action to be brought. Now, although they allow this supplementary action to be brought, yet, when they pronounce the interlocutor after the supplementary action is brought, they do not appear to have pronounced it upon the terms of the conclusion in that supplementary action; but they only affirm the interlocutor of the Commissaries, by which yearly aliment was awarded to this lady. My Lords, they awarded this without any proof of the allegations contained in any of the summonses, except the production of these documents, although the allegations were positively denied by Sir James Campbell; and they thought—but, with great deference to them, I do not think that it is so plain a principle as applied to this case—that it was not competent to Sir James Campbell to set up the defence which he pleaded, and allege his own turpitude in his defence. It is perfectly true, that if Sir James Campbell represented this lady as his wife to strangers, or third parties, and if, in consequence of that, any obligations were incurred by him, I apprehend it would not then have been competent to him, as against third parties, and in opposition to his own conduct, and his own allegation that she was his wife, to set up a plea that they were never married. But here is this lady found not to be his wife—not instituting any action of damages against him on the ground that she had been seduced—not stating in either of the summonses any claim for damages, nor showing to your Lordships, not only that he had represented her to be his wife, but that he had seduced her under a promise of marriage, and that she had gone away with him in consequence of this promise and belief that she was to be his wife; but merely resting upon the ground, that because there had been no marriage, and that he had represented her as his wife, thereby she was entitled to damages, without alleging or proving any damage which she had sustained. But even although a person be so immoral as to treat a lady as his wife, and to hold her out to the world as his wife, yet she knowing and he knowing that they are not married, it is not competent for that lady to bring an action for damages against him. I admit, as it was admitted in the cases that have been cited, that if, upon the pretence of a solemnization of marriage, a man seduce the affections of a woman, and prevail with her to live with him upon the faith of his promise being fulfilled at a future period, it may be competent, and is competent, for her to maintain an action for damages against the person who had deceived her, and so immorally acted; or in the case where a woman is about to separate and break off an illicit connexion, and is prevailed on to remain, and live with the man as his wife, upon the faith of the promise that he will provide for and marry her, that would be a ground of action on her part. In the present case, my Lords, there is no such allegation in the pleadings. All that is said is, that the defender represented this lady as his wife. The supplementary action concludes in a most extraordinary manner: That although she shall not be able to prove her marriage, or to prove any promise of marriage, yet, notwithstanding, as he had represented her as his wife, and committed a flagrant

May 23, 1826.

May 23, 1826. breach of the rules of propriety—(not to say of morality)—in introducing this lady as his wife,—as a chaste character,—and as holding a high situation,—into society, that the defender shall be liable to her in damages. Whatever right the Court had to complain of that representation in a moral point of view—and which they very properly reprehended in strong terms—what right has this lady to complain of it? She cannot prove a marriage in Holland, or France, or anywhere. She does not pretend to say that he deceived her into a connexion with him, representing that he would marry her; but after she fails in proving the conclusions of her action,—that action calling not for alimony, but for damages for this supposed misconduct on the part of the husband,—the Court feel that it is difficult to support that finding, because she only asks for damages, and they had given her alimony; and although this gentleman appears to be now in a very advanced stage of life (but that is not a matter for consideration here), the Court award him to pay her £200 a-year. That supplementary action is brought without permitting him to rebut the action by proof, and they have awarded to her the sum of £200, cutting down the sum found by the Commissaries.

My Lords, the proceedings in this case are most voluminous, and I have taken rather a brief view of the whole of them, in order to bring the nature of the question succinctly before your Lordships, and the grounds upon which the Court below have proceeded in this case. I may repeat the observation I made upon the last case, as to this lady's not appearing. The cause stood over for some time, to see whether she would appeal against the finding upon the subject of the marriage, it being thought that it would be very material for her, if she could do it with any hopes of success; because, if it should be found in her favour, then there would be grounds for your Lordships to award her alimony. However, it has been represented that the state of health and mind of this lady is such that she could not be prevailed upon to institute any appeal—she being in a situation rendering it extremely difficult to make her comprehend the nature of an appeal, or the proceedings it would be necessary for her to take. The result was, that this appeal was heard before your Lordships ex parte—no person appearing for the respondent; and in this case, as in the last case which I had the honour of stating to your Lordships, I have felt a great deal of difficulty in wading through the variety of interlocutors pronounced, and examining the grounds on which they have proceeded. However, my Lords, the best attention which I have been able to pay to this case—and I assure your Lordships that the conclusion to which I have arrived has not been without many anxious considerations, as well to the parties as to your Lordships—and the arguments that I have heard at your Lordships' bar, have impressed me—and the facts of the case, and the private consideration I have given to it, have impressed me, with a notion that it is impossible to sustain these interlocutors, upon the grounds stated in this libel. Therefore, in this case, as in the last, however painful it may be to me, I feel myself

bound to advise your Lordships to come to that conclusion; and it is particularly painful, after the very elaborate and able judgments pronounced by the Court of Session, but who appear to me to have been so strongly impressed, and rightly so, with the misconduct of this gentleman, that they have been anxiously desirous of affording relief to this lady; and, in that view, they have gone further, in their interlocutors, than it appears to me they were warranted in doing by law. It is the province of a Judge, or at least I feel it to be mine, to divest myself, as far as I can, of any feelings that may be excited by the misconduct of any party. It is the duty of a Judge, however painful it may be to him, to look at the case stripped of the prejudices which would otherwise be excited in his mind, and to look at it as a question of law to be applied to the facts of the case. Whenever he suffers his judgment to be warped by any misconduct of the parties, I think that Judge is very likely to err. Far be it from me to say, that that is the case in the Court below. They have felt, and very rightly felt, a desire, if they could, to fix this gentleman with alimony, although the lady had failed in proving the marriage. But we must look at, and consider well, the grounds she states for claiming that alimony, or damages, for it is difficult to say which it is. It is incumbent on the Judge to see, whether, consistently with the law, she is entitled to relief. I have looked again and again to the first amended summons, and the second amended summons, and, upon the whole, I am bound to state to your Lordships what my opinion is, however it may differ from the Court below. My opinion is, that this lady's claim for damages is not only not supported by any case upon this subject, but I think she has not stated, in any of her summonses, a ground to call upon this gentleman for damages. Had she stated that she had been seduced by him to remain, in consequence of representations made,—being desirous of abandoning that course of life, and that he had promised her alimony,—whatever might have been your Lordships' judgment upon that case, no such allegation is made here. All she says is, that there were representations, and so forth, that she was his wife, and that she was received as such, and is therefore entitled to damages. I do not think that she is. It must be recollected that she is a particeps criminis. It is in vain for her to come and say to the defender, 'You shall not allege your 'own turpitude in defence of this action;' because, if he be alleging his own turpitude, he is also alleging the turpitude of the very party who is seeking damages. If it be turpitude in him to insist upon that defence, it is equally turpitude in her to institute this action; because she must admit, that she has been living in this way with this gentleman, and although knowing that she was not his wife, she holds herself out in this case as entitled to relief. It is impossible to say that this lady is either entitled to alimony or damages; and therefore, on the whole, as it is extremely difficult to reverse these interlocutors simply without creating confusion, I think that your Lordships would be justified in coming to the conclusion, that neither under the first nor under the second summons, was the pur-

May 23, 1826.

May 23, 1826. suer entitled to damages; remitting the case to the Court below, with that declaration.

Mackenzie's Authorities.—Lyon v. Gordon, July 20, 1665.—Drummond v. Hope, April 2, 1774.—Purle, May 15, 1706.—Irvine v. Hamilton, July 13, 1706.—Cochlaw v. Agnew, Mar. 11, 1719.—Campbell v. Cochrane, July 27, 1747.

J. RICHARDSON, SPOTTISWOODE, and ROBERTSON, Solicitors.

No. 27. JAMES CAMPBELL, Esq. of Bedlay, Appellant.—*Adam*—*Wilson.*

Mrs STEELE and J. LANG, Respondents.—*Stephens.*

Superior and Vassal.—*Trust.*—A party having, by missive, feued a piece of building ground in his own name, and thereafter alleging that he had done so on behalf of a married woman, to whom he desired the feu-charter to be granted in life-rent, excluding her husband's jus mariti, and to her children in fee; and an action having been brought by her to compel the proprietor to execute the deed accordingly,—Held (reversing the judgment of the Court of Session), that there was no evidence of the trust to affect the proprietor, and that he was not bound to execute the feu-charter so demanded.

May 23, 1826.
1ST DIVISION.
Lord Alloway.

THOMSON, a mason in Airdrie, wrote to Mr Campbell of Bedlay, in these terms:—'Molinsburn, 26th Sept. 1818. I have 'agreed to feu from you ninety feet from east to west along the 'Cumbernauld road, by the road which leads to Logie water, 'and to go north 40 yards from the said front; also the road 'that goes to Logie water to be twenty-four feet in breadth; for 'which I pay for a feu of these, for which I offer one shilling 'and eight pence per fall for the whole, also the rights that is to 'follow thereon. Entry of the feu to be at Martinmas next, and 'to be payable half-yearly; first term payable at Whitsunday '1819.'—Mr Campbell answered:—'Molinsburn, 26th Sept. '1818. I accept of the above offer. To Mr Andrew Thomson, 'mason, Airdrie.'

Soon thereafter Thomson began to build a house on the ground so feued; and obtained from Campbell advances to the extent of £30, upon security of the feu, to enable him to procure materials, for which he gave him this acknowledgment:—'8th Sept. '1819. I hereby acknowledge to have, of this date, received 'from you £12 Sterling, which, with £18 paid by you to me 'some time ago, is £30 Sterling; and which sums I have got 'from you for the purpose of enabling me to finish the house 'which I am building upon the piece of ground feued by me

'from you at the Molins; and which sum, it is understood, shall May 23, 1826.
'be declared a real lien or burden upon the property in the
'disposition or charter which I am to obtain from you, as my
'right to that piece of ground.'

On the 27th November thereafter, Campbell being a creditor of James Lang, the husband of the respondent Ann Steele, and learning that Thomson was indebted to him in a sum of money for materials furnished to the house, arrested in the hands of Thomson; Thomson, on the 1st December, addressed this letter to Campbell:—'It having been for behoof of my aunt Ann 'Steele, spouse of James Lang, residing in Airdrie, and her 'children, and at request of my grandmother, Mrs Steele of 'Birkenshaw, that I feued the piece of ground from you at Mo-'linsburn, I request that you will be so kind as execute the feu-'contract thereto, in terms of our original intention, in favour of 'Mrs Lang, in life-rent, secluding the jus mariti, &c. of her 'husband to her children in fee. Mrs Lang will inform you of 'further particulars, and pay the necessary expenses.'

Campbell declined to grant the feu-charter to the Langs, because Thomson was the person with whom he had contracted, and that he conceived the letter introducing them as the parties interested, was the result of a collusive scheme to defeat the arrestment. An action was then raised by Ann Steele, with concurrence of James Lang, her husband, against Campbell and Thomson, stating that Thomson had entered into a missive with Campbell, whereby the latter feued to Thomson, 'for be-'hoof of the pursuer and their family, a small piece of ground 'in the village of Molinsburn, for the purpose of building; upon 'which a house had since been built, in consequence of money ad-'vanced by the pursuers, amounting to the sum of £172, 19s. 6d.;' that it was 'distinctly understood by the parties at the time, 'that the feu to Thomson was in trust for behoof of the pur-'suers and their family;' that the pursuers had ineffectually required Campbell and Thomson, conjunctly and severally, 'to 'execute and deliver to Mrs Steele a valid and sufficient feu-con-'tract, or other conveyance, of the said piece of ground and 'house erected thereon,' and to make payment of the rents intromitted with by Thomson since the date of the missive. In evidence of the trust, they founded on the letter of Thomson addressed to Campbell, on the 1st December, and they concluded that it ought to be declared, 'that the foresaid mis-'sive, entered into by the said James Campbell and Andrew 'Thomson, was a trust in the person of the said Andrew 'Thomson, for the use and behoof of the pursuer and their 'foresaids; and the said defenders ought to be decerned and

May 23, 1826. 'ordained, by decree foresaid, conjunctly and severally, or 'one or other of them, to denude of the said piece of ground, 'feued in manner before specified, and house erected there- 'on, with the pertinents; and to execute and deliver to and 'in favour of the pursuer Ann Steele, and her said children, all 'deeds requisite and necessary for vesting the said subjects in 'them, as aforesaid, in terms of the original missive and agree- 'ment of parties, with warrandice thereof,' &c. Thomson allowed decree in absence to pass against him; but Campbell gave in defences, denying that he had contracted, or intended to contract, with any other person than Thomson himself; that he had any knowledge of the alleged trust; and maintaining that he could not be affected by the collusive scheme between Thomson and the Langs; that even if he had been under any obligation to grant a feu-charter to them, he was not bound to do so in the manner demanded; and that at least he was entitled to withhold the charter, until he had received payment of the advance made to Thomson, and the debt due by Lang.

The Lord Ordinary found 'the trust alleged by the pursuers 'sufficiently established by the letter founded on in the sum- 'mons and the decree already pronounced against the defender, 'Thomson, and not reclaimed against as to him,' and decerned accordingly, and ordered a condescendence by the pursuers, of an allegation, that the £30 had not been advanced by Campbell. Thereafter his Lordship, on advising a representation by Campbell, adhered, 'in respect that the granting of a feu im- 'plies no delectus personæ; and that, therefore, the person 'obliging himself to grant the feu, must grant the same to any 'person having right thereto, either in consequence of the ori- 'ginal trust, under which the person originally acquiring it may 'have acted, or in consequence of any transference he may af- 'terwards have made, saving always any claim for money ad- 'vanced, or obligation entered into by the person granting the 'feu to the person obtaining it upon the faith of that feu, while 'ignorant of either the trust or of the transference; and the in- 'terlocutor completely reserves the representer's (Campbell's) 'right, if he shall be enabled to establish the advance made to 'Thomson.'

Campbell then petitioned, and the Court, on advising his petition without answers, recalled the last interlocutor of the Lord Ordinary, and remitted to him to proceed in terms of the previous one. After some proceedings, the Lord Ordinary found, that in consequence of certain counter claims, the total sum to which Campbell had right, on account of his advances to Thomson, was £6, 4s. 7d. This judgment having

been brought under his review by Campbell, his Lordship adhered, and on payment of that sum being made, decerned in terms of the libel, 'in respect it has been finally decided 'that Thomson held the feu in question for Mrs Steele, who 'had advanced the money for building, and her daughter, Mrs 'Lang; and decree was pronounced in terms of the conclu-'sion of the libel, and in terms of the original missive and 'agreement of parties, and the petitioner (Campbell) does not 'pretend to have any claims against Mrs Steele or her daughter, 'Mrs Lang.' Against these judgments, Campbell reclaimed; but the Court adhered, on advising a petition with answers, and thereafter, on the 25th May 1824, refused a petition without answers.* May 23, 1826.

Lord President.—The trust is clearly established, and although Mr Campbell has no doubt a good claim against Thomson, yet he has none against Lang.

Lord Hermand.—I am of the same opinion. Indeed, I cannot see how the pursuers can be made liable for advances made to Thomson in his private capacity; besides, they are compensated. The claim against Lang is not relevant as a defence in this question.

Lord Balgray.—I concur. The interlocutor does not deprive Campbell of his claim against Lang, if it be well founded.

Campbell appealed.

Appellant.—The agreement to feu was with Thomson himself, and for his behoof alone, and the appellant is ready to fulfil it, by granting him a charter, on receiving payment of the balance due him, and the arrested sum. The appellant never came under any obligation towards the Langs, and certainly is not bound to execute the feu-right they call for. He is entitled to all the casualties of superiority, of which he cannot be disappointed by the shape in which the respondents insist that the charter shall be given. In one sense of the word, there may be no delectus personæ in feuing, where a vassal has it in his power to convey and transfer his interest in the feu to whom he chooses; but still, so far as regards choosing the first vassal, the superior may exercise a delectus personæ; and in this instance the appellant would not have feued to Lang.

* See 3 Shaw and Dunlop, No. 41.

May 23, 1828. Besides, the view of the Lord Ordinary on this point was not adopted by the Court. There is no legal evidence that can bind or affect the appellant, and establish that the feu was taken in trust. At all events, Lang could never claim a feu-charter until he paid the debt due to the appellant.

Respondent.—There is ample evidence that the feu-right in question was taken in trust by Thomson. In feus there is no delectus personæ. The only patrimonial interest the appellant had to protect, was the debt due to him by Thomson; but the balance due has been offered to him. As the original feu-right was taken in Thomson's name, the appellant cannot pretend that he relied on the security of that right, for payment of any debt due by Lang.

The House of Lords ordered and adjudged, 'that the said in-'terlocutors complained of in the said appeal be, and the same 'are hereby reversed, and that the said James Campbell be re-'soilzied from the conclusions of the libel.'

Lord Gifford.—There is a case which has been heard before your Lordships, in which James Campbell, Esq. was the appellant, and Mrs Ann Steele, spouse of James Lang, residing in Airdrie, and he for his interest, were the respondents. This was an appeal against the several interlocutors of the Court of Session, pronounced in an action commenced by Mrs Steele and her husband against James Campbell, Esq. of Bellay, and Andrew Thomson, mason in Airdrie, for the purpose of compelling Mr Campbell to execute a feu-disposition of certain property which had been contracted to be feued by Mr Campbell to a person of the name of Thomson. It appears that in the year 1818, Mr Thomson, who was a mason in Airdrie, applied to Mr Campbell for a feu-right to a piece of ground, situated in the village of Molinsburn, upon which Thomson stated himself to be desirous of erecting a dwelling-house. The appellant states, that being well pleased that Thomson should settle in the village, he readily acceded to this proposal. Accordingly, an offer was made by Mr Thomson by a letter, written by him to Mr Campbell, bearing date the 26th September 1818.—(His Lordship here read the letter.)—That letter was signed by Mr Thomson, and the offer was accepted by Mr Campbell.

Your Lordships perceive, that by these letters there was a contract entered into by Mr Campbell, to feu to Mr Thomson this piece of ground situated in the village of Molinsburn. Thomson accordingly, as is stated, and not denied, entered upon this land, and commenced the building of a house. On the 8th of September 1819, a letter was written by Mr Thomson to Mr Campbell, at least a letter of that date—whether it was sent at that or a posterior time, does not distinctly appear; nor does it

seem very much to signify—was sent by Mr Thomson, in which he pro- May 23, 1826.
fessed to have received from Mr Campbell £12 Sterling, 'which,' he says, 'with £18 Sterling paid by you to me some time ago, is £30 Sterling, 'and which sum I have got from you, for the purpose of enabling me to 'finish the house which I am building upon the piece of ground feued by 'me from you at the Molins, and which sum it is understood shall be 'declared a real lien or burden upon the property in the disposition or 'charter which I am to obtain from you as my right to that piece of 'ground.' However, on the 1st of December 1819, a letter was written by Thomson to the appellant, Mr Campbell, which has given occasion principally to the question in this cause. It is a letter, dated at Airdrie, 1st December 1819, and to the following effect.—(His Lordship then read the letter.)—Mr Campbell, conceiving that the contract he had made, had been with Thomson personally, and with Thomson on his own account, and not, as stated in this letter, as trustee for Mrs Lang and her children, refused to comply with the request made in this letter. In consequence of that, an action was brought by Mr and Mrs Lang against Mr Thomson and against Mr Campbell, the terms of which it is important to attend to. The summons states, 'That Andrew Thomson, mason, 'Wandsmailing, near Airdrie, at the request and by the directions of the 'pursuers and Mrs Steele of Birkenshaw, entered into a missive with 'James Campbell of Bedlay, of date the day of 1818, 'whereby the said James Campbell feued to the said Andrew Thomson, 'for behoof of the pursuers and their family, a small piece of ground in 'the village of Molinsburn, and parish of Calder, for the purpose of build-'ing, upon which a house has since been erected, in consequence of mo-'ney advanced by the pursuers, amounting to the sum of £172, 19s. 6d. 'Sterling, conform to account herewith produced.' Then it alleges, 'that 'although the foresaid transaction was entered into by Campbell and 'Thomson, and a missive for the said piece of ground taken in the name 'of Thomson, yet it was distinctly understood by the parties at the time, 'that the same was in trust, for behoof of the pursuers and their family.' Then the summons sets out the letter of the 1st December 1819, which I have read to your Lordships, and proceeds, 'from which it is clear 'and apparent, that the said transaction and missive was a mere trust in 'the person of Thomson, for behoof of the pursuers and their foresaids; 'and although the pursuers have often desired and required Thomson 'and Campbell, conjunctly and severally, or one or other of them, to 'execute and deliver to Mrs Steele, a valid and sufficient feu-contract, or 'other conveyance, to the foresaid piece of ground, and house erected 'thereon, and to make payment of the rents, maills, and duties of the 'same, intromitted with by Thomson since the date of the said missive, 'yet they refuse, or at least delay, so to do.' The summons then states, that it should be declared, 'that the foresaid missive entered into betwixt 'Campbell and Thomson, was a trust in the person of Thomson, for the 'use and behoof of the pursuers and their foresaids; and the defenders 'should be ordained, by decree foresaid, conjunctly and severally, or one

May 23, 1828. 'or other of them, to denude of the said piece of ground, feued in manner before specified, and house erected thereon, with the pertinents; 'and to execute and deliver to and in favour of Mrs Steele and her children, all deeds requisite and necessary for vesting the subjects in them, 'as aforesaid, in terms of the original missive and agreement of parties, 'with warrandice thereof.'

My Lords, upon this summons defences were put in by Mr Campbell; and he stated, that he knew nothing of any pretended trust supposed to be subsisting between the pursuers and defender Thomson, and he could not be affected by collusive agreements on this subject, concerted between these parties; that he never agreed to sell or feu to the pursuers the property libelled, or any other property; that he never dealt with Thomson, as trustee for the pursuers, to any extent whatever; and he denied in toto the right of the pursuers to call upon him to denude of the property in question, or to execute or deliver any deed in their favour.

The case came before the Lord Ordinary, and he pronounced the first interlocutor which is appealed against; and, by that interlocutor, he found the trust alleged by the pursuers sufficiently established by the letter founded on in the summons, and the decree already pronounced against the defender Thomson, not reclaimed against as to him, and decerned accordingly. I should have stated to your Lordships, that no defence was made by Thomson, and therefore the Lord Ordinary referred to the decree pronounced against Thomson, as one of the grounds upon which he considered that a trust had been sufficiently established. Then he goes on, 'but before farther answer, as to the claim of the defender, 'James Campbell, for his debt of £30, allows the pursuers to give in a 'condescendence, framed in terms of the act of sederunt, of the facts and 'circumstances they offer to prove in support of their statement, that 'no such sum was advanced by the said James Campbell.'

Your Lordships perceive, therefore, by this interlocutor, that although the Lord Ordinary had distinctly found that this trust was sufficiently established by the letter founded upon in the summons, and the decree pronounced against Thomson, and, therefore, that the trust was a trust declared at the time of the contract, yet, at the same time, (as it appears to me, a little inconsistently,) he is of opinion, that although Thomson contracted as a trustee, and that trust had been established, Mr Campbell had a right to be paid a debt due from Thomson, the trustee. If the fact was, that Thomson had actually contracted qua trustee for those persons, and that Mr Campbell contracted with him qua trustee, it is a little difficult to see how Mr Campbell could insist on being paid the debt due from the trustee, before he executed his feu-contract to the cestui que trust. However, such was the interlocutor of the Lord Ordinary.

The appellant presented a representation against this interlocutor; and then the Lord Ordinary pronounced another interlocutor, as follows: 'In respect that the granting of a feu implies no delectus personæ, and 'that, therefore, the person obliging himself to grant the feu must grant 'the same to any person having right thereto, either in consequence of

'the original trust under which the person originally acquiring it may May 23, 1828.
'have acted, or in consequence of any transference he may afterwards
'have made, saving always any claim for money advanced, or obliga-
'tion entered into by the person granting the feu to the person obtaining
'it, upon the faith of that feu, while ignorant either of the trust or of the
'transference; and the interlocutor complained of completely reserves
'the representer's right, if he shall be enabled to establish the advance
'made to Thomson; refuses the representation, and adheres to the inter-
'locutors complained of.' Now here, my Lords, the Lord Ordinary takes another ground. As I have stated to your Lordships, (and it was on that account I called your Lordships' attention to the summons,) the summons expressly proceeds upon the ground, that the contract with Thomson was a contract qua trustee for the pursuers' use, and that Mr Campbell entered into the contract with Thomson knowing that such was the case. It appears that on the case coming on before the Lord Ordinary, the second time, another ground was taken by the pursuers in the action, namely, that although there were no trust originally communicated to Mr Campbell, yet as there was no delectus personæ, (according to the expression used by the Lord Ordinary in his judgment,) in respect of the granting of the feu, it was competent for Mr Thomson, if that contract had been entered into between him and Campbell, to declare the trust for any other person, or to assign the benefit of that contract to any other person, in any manner; and that it was competent to the trustee to compel Mr Campbell, the owner of the property, to grant the feu-right to him; and not only to grant the feu-right to him, but to Mrs Lang for life, and then to her children; in short, in any way which the assignee might require.

My Lords, on these interlocutors being brought under the review of the Court of Session, they recalled that interlocutor, and therefore they disaffirmed that interlocutor, proceeding upon the ground that the granting of a feu implies no delectus personæ, and remitted the case to the Lord Ordinary to proceed in terms of his previous interlocutor; that is, upon the ground that the trust had been sufficiently established, and that therefore the pursuers were entitled to call for this feu-contract under that trust.

My Lords, proceedings then took place before the Lord Ordinary, with respect to the amount of the debt due from Thomson to Mr Campbell. It appeared, at last, that there was a balance only, I think, of £6, 4s. 7d.—the difference between £23, 15s. 5d. and £30, due to Mr Campbell. Various proceedings took place, and Mr Campbell, I should have stated to your Lordships, contended that even if he were compelled to grant this feu-right to Mr and Mrs Lang, still Mr Lang was indebted to him—that this action was a contrivance to prevent his being enabled to recover his debt against Mr Lang—and that if he were compelled to convey this feu to Mr Lang, he, Mr Campbell, should be allowed to deduct the amount due to him. He did not, however, succeed in that; and the decision of the Court of Session was, that he was bound to convey this

May 23, 1826. feu to Mr and Mrs Lang, on the terms of the original interlocutor of the Lord Ordinary.

My Lords, this case is a very unfortunate one. The value of this property is, I believe, not very large, and therefore it is a matter of more anxious consideration with me than it would otherwise be; but after the most attentive consideration of this question, I am unable to coincide with the finding of the Lord Ordinary; and I will state to your Lordships why.

That the original contract was made with Mr Thomson, without any reference to any trust, is perfectly clear from the letter. That letter bore date in the month of September 1818. Things remained in that situation till the month of December 1819, Mr Thomson having gone on building this house; and, as Mr Campbell alleges, he during all that time being in perfect ignorance of this trust; and no evidence whatever has been given, except this letter, in the month of December 1819, to show that he ever contracted with Mr Thomson qua trustee. Now, my Lords, that letter is dated fifteen months after the original contract. In that letter certainly Mr Thomson states, that at the time of the original contract, it was made for the behoof of his aunt, and requests that Mr Campbell will be so kind as execute the feu-contract thereto, in terms of the original intention. It is true, Mr Thomson has suffered judgment in this case to pass against him. As between him and the Langs, to be sure, he has admitted that this contract was made by him for their behoof; but the ground of this action, and this summons, is, that not only was the contract so entered into by him for the benefit of Mrs Lang and her children, but that that contract was so made by Mr Campbell, and that Mr Campbell knew that that was the nature of the trust existing at that time. Now, my Lords, I must confess that on looking through these proceedings, I do not see that there is any evidence to bear out the respondents in that allegation.

Upon the other ground, if it were necessary to go through it, I think a great deal of observation might be made. I mean, supposing there was no trust originally, whether it would be competent for Mr and Mrs Lang to compel the performance of this contract by Mr Campbell; particularly, to compel him to grant this feu-right to Mrs Steele and her children, excluding the jus mariti of the husband. But it is unnecessary to consider that point, because the Court of Session have not considered it. The whole ground of this decision is, that it has been established by sufficient evidence, that there was this trust at the time when the contract was entered into, between Mr Campbell and Mr Thomson; and, of course, if so, that that was known to Mr Campbell; because, if it were not, it appears to me extremely difficult, indeed impossible, to support this action. The summons proceeds directly on the allegation, not only that there was this trust, but that the contract was entered into by Mr Thomson and Mr Campbell, with the knowledge of that trust. Upon that there is really no evidence, except this letter, written fifteen months after the transaction; and although, as I have stated to your Lordships, that the other letter, written by Thomson on the 8th of

September 1819, ought not to be much relied upon (for it is admitted that it was not sent at the time it bears date); yet, at whatever time it was sent, that letter, as far as it goes, is a statement by Mr Thomson that the contract was for his benefit—at least it so treats the contract; for he states, that he had received £12 Sterling, which, with £18 Sterling, is £30; and which sums he got from Mr Campbell for the purpose of enabling him to finish the house which he was building upon the piece of ground feued by him from Mr Campbell—not feued by him for the benefit of Mr and Mrs Lang and their children,—for the words 'feued by 'him,' must be taken to mean 'feued by him for his own benefit.' But I do not think much reliance ought to be placed upon that letter, for the reason I have stated. It was said on the other side, that the letter had been obtained by Mr Campbell from Mr Thomson, for the purpose of making it evidence against Mr and Mrs Laing: and, in the Court below, no proof was given when that letter was actually sent. It might not, therefore, have been sent till after the date of the other letter of 1819, in which Mr Thomson states, that the contract was made out, not for himself personally, but for the benefit of those other persons. My Lords, it appears to me, however, that no sufficient evidence has been given to establish that against Mr Campbell. It appears to me that this interlocutor cannot stand. As I said before, Mr Thomson having suffered judgment in this action, furnishes no evidence to affect Mr Campbell; for, if Thomson is colluding with Mrs Lang, it is on her behalf that he makes no opposition; and however his conduct may be conclusive as between him and Mr and Mrs Lang, it cannot affect Mr Campbell, the appellant, for the reason I have stated, that there has been no evidence to bring home to him a knowledge, at the time the contract was entered into, that the contract was completed on her behalf. May 23, 1826.

My Lords, taking into consideration all these facts, however unfortunate the circumstances of this case may be for the respondents, it appears to me, that, consistently with the facts proved in this case, the form of the action, and the ground of the action stated in the summons, it is impossible that your Lordships can sustain these interlocutors. It will be my duty, therefore, to move your Lordships, that these interlocutors be reversed, and that Mr Campbell be assoilzied from this action.

FRASER, A. DOBIE, *Solicitors.*

No. 28. ALEXANDER M'CALLUM, Appellant.—*Murray—John Campbell.*

WILLIAM ROBERTSON, Respondent.—*Shadwell—Keay.*

Submission.—A submission having been made to three arbiters, and in case of their differing in opinion, to any two of them, of all claims which the parties submitting had against each other for the proportions of profit and loss which they ought to have borne for a particular year, arising out of the transactions of a Company of which they were partners, and with power to the arbiters to ascertain whether there had been any error in the books of the Company; and a decree having been pronounced by two of them (without previously issuing notes) on the narrative that the other had differed in opinion; and having, without investigating the books, found one of the parties liable in a certain sum, as the loss corresponding to a certain share,—Held (affirming the judgment of the Court of Session), 1st, That the decree was valid, although signed by the two arbiters only, and although there was no evidence under the hand of the third arbiter that he had differed; 2d, That the questions submitted were exhausted; and, 3d, that the failure to issue notes was no objection to the decree.

May 23, 1826.

1ST DIVISION. Lords Kinneder, Mackenzie, and Eldin.

FOR some years prior to 1810, the appellant M'Callum was clerk and book-keeper of the Company of Robertson and Oughterson, merchants, Greenock, of which the respondent Robertson was a partner to the extent of three-elevenths. In that year, M'Callum was admitted a partner to the extent of one-eleventh, and he continued to hold that share alone till May 1815. During the intervening period, the books were regularly balanced by him, and the shares of profit or loss corresponding to the interest of the respective partners were carried to their separate private accounts. After they had been so balanced in 1815, M'Callum proposed that his share should be increased to two-elevenths, and it was alleged by Robertson that this was agreed to, and that the arrangement was carried into effect by transferring one of his shares to M'Callum, so that each of them thenceforth held two-elevenths. A considerable loss was sustained by the Company during the year 1815–1816, and it was ascertained that the proportion of it which fell on each one-eleventh share was £904, 16s. 10d. In dividing this loss, however, among the partners, M'Callum charged himself with only one-eleventh share, while he set against Robertson the loss corresponding to three-elevenths shares. This was carried to the respective accounts of the parties in a new set of books, which were opened in consequence of some of the partners having retired. These books were balanced in 1817, 1818, and 1819, on the above footing; but M'Callum being about to retire, and a settlement of accounts being about to take place in 1819, Robertson objected to the balance as struck in

1816, and maintained that as one of his shares had been transferred to M'Callum, he ought to have been charged with the loss falling on two shares, and therefore debited with £904, 16s. 10d. This being disputed by M'Callum, a submission was entered into by them on the 25th December 1821, by which they referred 'to James Leitch and Duncan Ferguson, merchants in Greenock, and Alexander Campbell, Sheriff-substitute at Paisley, 'arbiters mutually chosen by the said parties, and in case of their 'differing in opinion, to any two of them, all claims, disputes, 'and demands, subsisting between the said parties respecting the 'proportions of profit and loss arising out of the transactions of 'Robertson and Oughterson, merchants in Greenock, for the 'year ending in May 1816, which they ought respectively to have 'borne, and which ought to have been carried to their respective debits and credits in the books of that Company, with 'powers of the said arbiters to ascertain whether or not there 'was any error, and if any, to what extent, committed in the 'statement of the accounts of the said parties carried into the 'balance struck upon the books of the said Company upon the '7th day of May 1816; and for that purpose to call for production of the books of the said Company and all writings necessary, and in general to take all manner of probation by writ, 'witnesses, or oath of party, or in such other manner as they 'shall see proper.' May 23, 1826.

Robertson, in his claim laid before the arbiters, stated, that one of his three-elevenths had, prior to 1816, been transferred to M'Callum, who consequently held two-elevenths; and therefore in striking the balance of loss, only two-elevenths should have been put to his (Robertson's) debit, while two, instead of one-eleventh, should have been placed at M'Callum's debit. M'Callum, in his answer, admitted that an arrangement for increasing his share to two-elevenths had been contemplated, but he denied that it had been completed, and maintained, that he was justified in debiting himself with only one-eleventh, and debiting Robertson with the whole three-elevenths.

Various investigations took place before the arbiters; the parties were repeatedly examined; the depositions of witnesses were taken; and such documents and excerpts from the books produced as the parties thought were calculated to throw light on the point in dispute.

In May 1822, the following award was pronounced, without any notes of the opinions of the arbiters having been previously issued.

'The said arbiters having proceeded to consider a claim which

May 23, 1820. 'was laid before them by the said William Robertson, respecting the subject matter submitted as aforesaid, and also objections thereto, on the part of the said Alexander M'Callum, and having duly investigated the matter by examination of the parties themselves, and others connected with them, respecting the subject in dispute, and by examination of witnesses and of documents produced to the arbiters, hinc inde, and heard parties viva voce, the said arbiters have ultimately met and consulted together respecting the award which ought to be given: the said Duncan Ferguson declared himself to be of a different opinion from that which the other arbiters had formed upon the merits of the question at issue. Therefore, in virtue of the powers by the said submission, committed to any two of the arbiters, in the event of a difference of opinion taking place, and being well and ripely advised, and having God and a good conscience before our eyes, We, the said James Leitch and Alexander Campbell, two, and a majority of the said arbiters, do now give forth and pronounce our final sentence and decreet-arbitral as follows: viz. We find the said William Robertson entitled to receive from the said Alexander M'Callum the sum of £904, 16s. 10d. Sterling; which sum we decern and ordain the said Alexander M'Callum to pay to the said William Robertson within twenty-one days from the date hereof, with the legal interest to become due thereon, from and after the expiry of that time till payment be made.'

M'Callum being dissatisfied with this award, suspended a charge given on it, and raised an action of reduction, maintaining, first, that the submission was special, and regarded certain claims particularly described, whereas the award was merely a particular finding, that a sum of money was due, without reference to or decision of the matter specially referred; and, secondly, that the decreet was pronounced by only two of the arbiters, without any legal evidence of that deliberation by all the three, and that difference of opinion which, under the submission, conferred on the two who did agree the power to determine the points in dispute. Lord Kinedder in the reduction ministerized Robertson, and in the suspension repelled the reasons, and decerned accordingly. This judgment was adhered to by Lord Mackenzie; but on a second representation, Lord Elchies appointed M'Callum to condescend on the facts he offered to prove with regard to the alleged omission of the arbiters to decide the special points referred to them by the submission, and their errors or omissions, in estimating the profit and loss account of the Company of Robertsons and Oughterson for the year from May 1815 to May 1816. Thereafter, on advising the

condescendence and answers, his Lordship found, 'that the de- May 23, 1826.
'creet-arbitral in question was not authorised by the submission;
'and therefore recalled the interlocutors complained of, and in
'the reduction reduced, decerned, and declared, in terms of the
'conclusions of the libel, and in the suspension suspended the
'letters simpliciter,' and found expenses due. Robertson having petitioned, the Court altered the interlocutor reclaimed against, and 'found that the decree-arbitral in question, having been 'signed by the two arbiters, was valid and effectual in point of 'form, and therefore, in the process of reduction, sustained the 'defences, and assoilzied the petitioner from the conclusion of 'the libel, and in the process of suspension repelled the reasons 'of suspension, found the letters orderly proceeded,' and expenses due. To this interlocutor they adhered on the 3d June 1825, and awarded £145, 11s. 6d. as costs to Robertson.*

Lord Hermand.—The Lord Ordinary's interlocutor is too general for me to understand its application to this case. It appears to me that the decree was authorised by the terms of the submission—that it has exhausted the question submitted,—and that it has been properly pronounced by the two arbiters.

Lord Balgray.—There is nothing in the objection that the decree has been pronounced and signed by only two of the arbiters. But I have some difficulty as to whether they have decided all that was submitted to them. When, however, I look at the pleadings for M'Callum in the submission, and to his judical admissions, I think that it is clearly made out, that the matter submitted was only, whether he held one or two shares; and therefore he ought not to be allowed now to insist that an investigation of all the previous accounts of the Company should have been gone into.

Lord Craigie.—I have considerable doubts on both points. We have no evidence of there having been a difference of opinion, except the mere statement of the two arbiters, which is not sufficient; but it was only when such a difference took place that they were to have authority to decide the question. I think we ought to insist strictly on matters of form in submissions, seeing the great difficulty in setting them aside, even where plain injustice has been committed. It also appears to me, that the proper inquiry has not been made, and the case has not been exhausted by the arbiters; but I am disposed to rest my opinion on the first point.

* See 4 Shaw and Dunlop, No. 53.

May 23, 1826. *Lord President.*—If we do not hold that the arbiters differed in opinion, we must presume that they agreed; and if they did so, then the decree may be signed by the other arbiter at any time.

Lord Gillies.—The circumstance of the arbiter not having signed the decree is at least prima facie evidence that he dissented, and it is not alleged that he concurred in it. The decree appears to me to have exhausted everything submitted. The arbiters have rectified the error committed in making up the balance for the year 1815-1816, which was what they were called on to do. The interlocutor must therefore be altered.

M'Callum appealed.

Appellant.—The award was pronounced by two of the arbiters, without any other attestation than their assertion, that the third differed in opinion from them, or that he had even considered the points submitted. The decisions which are said to have settled this question, unfavourable to the appellant, do not apply.—In point of fact, the three arbiters never did ultimately meet and consult together respecting the award that ought to be given. Ferguson was present when consulting as to the amount of the appellant's interest, in which he differed from the other two arbiters, but not when deliberating on the amount of the loss arising upon transactions for the year ending May 1816. This was not a general, but a special submission; and the mere finding of a sum due, without referring to either of the special grounds, is not a decision on the points submitted. Neither did the arbiters exhaust the case before them. In addition to the question, Whether the appellant held one-eleventh or two-elevenths of the concern, there was the important inquiry, What should be put to his debt if he held the two-elevenths? That would depend on an investigation of the books, to ascertain what were the losses whilst the appellant held only one-eleventh, and what were the losses while he held two-elevenths; but this inquiry the arbiters did not go into, and although the fact is, that the heaviest losses were incurred when the appellant held only one-eleventh share. Besides, the arbiters pronounced decree, without having issued notes of their opinion, according to the invariable practice in Scotland.

Lord Gifford.—Such may perhaps be the practice in Scotland, but it is not required by law, and the omission to do so cannot render the decree objectionable.

Respondent.—The appellant does not allege corruption, bribery, or falsehood, and the decreet is valid and effectual in point of form. By the terms of the submission, it was competent, if there was a difference of opinion, for any two of the arbiters to pronounce decree. This was not the case of a devolution to an oversman—but each of the three arbiters had equal and correspondent powers—and no farther evidence than that afforded by the decreet is necessary, that one of them differed in opinion from the rest. The only claim and demand arising out of the dispute submitted, was the sum which the appellant was due to the respondent, in consequence of the transfer of the additional one-eleventh. There was no other disputed transaction between the parties; and, by the submission, the arbiters were authorised to decern for payment of whatever sum they should hold to be due by the one party to the other. They accordingly did so, and in doing so exhausted the submission—that is, they have fixed the sum with which the appellant ought to be charged. The pretence that there should have been an inquiry into the profit and loss of the various years to which the appellant refers, was altogether an after-thought on his part—no such claim was made to the arbiters, nor was their attention drawn to it. If the appellant had conceived that he had a right to go into a general accounting, he ought to have acted accordingly; but he did not, and, in truth, it was not a point submitted. The balances of former years have been all finally adjusted in the settlements of accounts for each respective year, and the matter submitted was, What was truly due by the appellant to the respondent? The arbiters took the requisite means to ascertain that point, and in deciding on it have exhausted the question submitted to their judgment.

May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, but found no costs due.

Lord Gifford.—My Lords, this is a case, in which Alexander M'Callum is the appellant, and William Robertson the respondent.

The simple question here is upon a decreet-arbitral, as it is called—an award as we should call it here—a decreet-arbitral pronounced between the appellant and the respondent. It appears that these two gentlemen were with others connected in partnership together at Greenock, under the firm of Robertson and Oughterson. That partnership commenced in 1809; and soon after the commencement of that partnership, and for several years afterwards, the appellant was entitled to one-eleventh share of the profits of the concern. It appears that, in the year 1815, Mr M'Callum

May 23, 1826. was desirous of increasing his share, and it is stated that, at the commencement of the year 1815, he had become interested in two-elevenths, taking from Mr Robertson, who had been previously interested in three-elevenths, one of his elevenths, and leaving him two-elevenths. It also appears, that though these arrangements were made, the accounts were still carried on by Mr M'Callum, who kept the books of the Company, as if he had been interested in one-eleventh; and that, at the close of the year 1816, there having been great losses incurred in that year in this concern, the amount of the one-eleventh debited to Mr M'Callum was the sum of £904 and a fraction. Afterwards, disputes arising between these parties as to the accuracy of Mr M'Callum's statement in 1816, it was agreed between the parties that these matters should be referred to arbitration; and it is important to call your Lordships' attention to the terms in which the parties submitted their disputes.

Three persons were named, namely, Mr Leitch, Mr Ferguson, merchant in Greenock, and Mr Campbell, the Sheriff-substitute at Paisley, as arbiters between the appellant and respondent; and the terms of the submission were as follows.—(His Lordship then read the terms of the submission.)

Your Lordships perceive that the matters referred to these gentlemen were the claims, disputes, and demands subsisting between the parties as to their respective proportions of profit and loss arising out of the transactions of Robertson and Oughterson, for the year ending in May 1816, and the arbiters were to have power to ascertain whether there was any error, and to what extent, committed in the statement of accounts between the parties. Accordingly, the matters went before these arbiters; and, for the purpose of satisfying myself as to the claims which these parties respectively laid before the arbiters, I called for the papers which had been laid before them, and which were furnished me by the parties. The reference was made on the 25th December 1821, and, in the month of May of the following year, 1822, a decreet-arbitral was pronounced by two of the arbiters—the third differing in opinion from them, and therefore not concurring in the award. Your Lordships will perceive, that, by the original reference, the matter was to be referred to these three gentlemen, and, in case of their differing, to any two, so that the two were competent to make the award. The decreet-arbitral, after reciting the submission in the terms which I have stated to your Lordships, went on as follows.—(His Lordship then read it.)

My Lords, after this award was pronounced, Mr M'Callum being dissatisfied with it, instituted proceedings in the Court of Session for the purpose of reducing or setting aside the award; and on the case coming before my Lord Kinedder, as Lord Ordinary, he pronounced an interlocutor of the 15th June 1822, the effect of which was to establish the award, and to assoilzie the defender from the action. I should have stated, that steps being about to follow on the decreet-arbitral, M'Callum, to stay them, brought also a suspension into Court. The matter came afterwards before Lord M'Kenzie, who succeeded Lord Kinedder

as Lord Ordinary, and he refused a representation for Mr M'Callum, May 23, 1828.
coinciding, therefore, in opinion with my Lord Kinedder. A second representation was then presented by the appellant, and the question came before my Lord Eldin, as Lord Ordinary, and he took a different view of the subject, and appointed Mr M'Callum to give in a condescendence, framed in the terms of the act of sederunt, of the facts which he averred and offered to prove on his part, with regard to the alleged omission of the arbiters to decide the special points referred to them by the submission, and their alleged errors or omissions in estimating the profit and loss account. The matter came on afterwards again before his Lordship, and he found that the decreet-arbitral was not authorised by the submission; therefore, he recalled the interlocutors complained of, and in the reduction, reduced, decerned, and declared in terms of the conclusions of the libel, and in the suspension, suspended the letters simpliciter, and decerned.

The case was then brought before the Court of Session, and their Lordships altered the last interlocutor of Lord Eldin.

My Lords, the objections to this award were two:—First, That there was no sufficient evidence that the third arbiter had differed in opinion with the other two; and that, therefore, it was not competent for those two persons to agree in this award. The Court of Session have been of opinion, upon the authorities and the principles of the law of Scotland, that there was no ground for that objection, it having been distinctly stated upon the face of that award, that the third had differed in opinion from the other *two*; and in that opinion I concur.

The other objection was, that the arbiters had exceeded their authority, or, at least, had not properly executed their authority; because it was said, that there were two questions upon which they had to determine, namely, first, the extent of the share of Mr M'Callum during that year, commencing in 1815 and ending in 1816; and then if that point were determined against him, namely, that he was interested in two-elevenths instead of one-eleventh, that the arbiters ought, in the second place, to have gone into the accounts of that year; and that, if they had done so, they would have found that Mr M'Callum ought not to have been charged to the extent of two-elevenths of the losses which had been created by the accounts of that year; because, as he said, upon the examination, it would be seen, that some of those losses ought to have been carried to the account of former years, when he was interested in only one-eleventh, and that, therefore, the account ought to be varied in that respect; and he argued thus:—'So long as I am interested in one-eleventh of the 'profits, and have to bear one-eleventh of the losses, it does not signify 'to what particular year's account that loss was carried; for it was the 'same thing to me whether carried to the one year or the other, if during 'the whole of that period my interest was to the extent of one-eleventh; 'but if it be found that my interest was altered in the year 1815, it was 'of great consequence to me, whether those losses are thrown on the 'profits of that particular year, or some of those losses are carried to an-

May 23, 1826. 'terior years, wherein, although I was interested, I was not interested to 'the same extent.'

To this it was replied, that both these matters were before the arbiters; that, in the first place, they had to determine the amount of the shares; and, in the next place, if there were any errors in the account, they had power to correct those errors; that it was competent to Mr M'Callum to state those errors to them; and that, if he omitted to do so, it was no fault of the arbiters that they took the accounts before them as they have taken them. Now, it was for that purpose that I called for the papers in the submission, because it is certainly true, that Mr M'Callum had an opportunity, if he chose, of saying,—'Though you 'have the accounts before you, I will show you there are errors in these 'accounts; and if you think that I am interested in those two-elevenths, 'you must correct the accounts, in the manner I shall state to you, to 'the extent of these errors.' I do not find that such matter was brought before the notice of the arbiters. The only question brought before them was, whether he was interested in one-eleventh or two-elevenths; and the correctness of the accounts appears to have been assumed by them, as they had a right to assume those accounts to be correct, till errors were pointed out to them. They found that Mr M'Callum was interested in two-elevenths, and that he was indebted in the sum of £900 and a fraction; and being interested in two-elevenths, he ought to have charged himself with that as between him and Mr Robertson. The terms of the submission are, of 'all claims, disputes, and demands,' respecting the proportion of profit and loss for the year ending in May 1816, which they (the parties submitting) ought respectively to have borne, and which ought to have been carried to their respective debits and credits in the books of the Company, with power to the arbiters to ascertain whether or not there was any error.

Now, my Lords, I am free to confess to your Lordships, that, upon the hearing, I was a good deal struck with the arguments on the part of the appellant, that the arbiters had not done their duty, in not entering into the correctness of these accounts; but when you look at the decreet-arbitral, your Lordships will perceive it expressly proceeds upon the recital of the submission, and then it says, 'and the said arbiters ha-'ving proceeded to consider a claim which was laid before them by the 'said William Robertson, respecting the subject-matter submitted as 'aforesaid, and also objections thereto on the part of the said Alexander 'M'Callum, and having duly investigated the matter by examination of 'the parties themselves, and others connected with them, respecting the 'subject in dispute, and by examination of witnesses and of documents 'produced to the arbiters hinc inde, and heard parties viva voce,' and so on; they conclude that Mr Robertson was entitled to receive from Mr M'Callum, in respect (as it must be taken) of that claim, which they recite had been laid before them by Mr Robertson, the amount of £904, which is the precise amount, if the account kept by M'Callum during that

year was correct, and which he would have been liable to Mr Robertson if he were interested in two-elevenths. May 23, 1826.

My Lords, after a very anxious consideration of this case, I must confess that I have come to the conclusion, that the Court of Session have decided rightly in this case; that the matter before the arbiters was with respect to the extent of the share of Mr M'Callum; and having decided that—at least having come to a conclusion upon it, and that the other question was also before them, namely, the loss with which he ought to be charged, we cannot set aside this decree. Mr M'Callum says, 'I 'never thought of going into the accounts—I did not think that they 'would have decided against me upon the eleventh;' and he adds, 'it is 'the practice of Scotland, in making out awards, that the arbiters fre-'quently give out a sort of minute of their intended decision, that the 'parties may know beforehand what the decision is, and make any formal 'objection they think fit.'—It was admitted at the bar, that that was not called for by the law of Scotland; that it is not the law in that part of the kingdom that the arbiters shall make any such communication. The whole matter was before the arbiters. Mr M'Callum knew that the whole matter was before them, not only as to the extent of his share, but as to the necessary consequence of deciding against him as to the extent of that share, namely, the extent of loss he had incurred. Looking, therefore, at the nature of the submission, and to the recital of the award, that it expressly states that the arbiters have proceeded upon this submission, and that Mr M'Callum had an opportunity, if he chose, of stating his objections to this account; and no objection being made, but it being taken for granted by all parties that the accounts were correct, and that all that the arbiters had to decide was the amount of the share,—whether it was a mistake or not, I am of opinion that we cannot now inquire; that the opportunity has gone by. He ought to have stated, first, 'I am only in-'terested in one-eleventh, or, if I am interested in more, I shall point out 'errors in the accounts.' It is preposterous to suppose, that the arbiters were to determine one branch of the proposition and not the other—the whole being referred to them; and they having the power to examine this account.

Taking all these circumstances into consideration, it does appear to me that there is no ground whatever to impeach the judgment which the Court of Session have given. Your Lordships will naturally suppose, this case underwent the repeated and anxious consideration of the Judges of the Court of Session; and, perhaps, although one may not concur in all the reasons they give for their decision, it is sufficient to say, that the result of their decision appears to be the correct result; and, therefore, in this case, I should humbly move your Lordships to affirm the judgment. This is, however, I think, upon the whole, a case in which your Lordships should not do anything more than simply affirm the judgment, and not fix the appellant with costs in consequence of his appeal against that judgment.

May 23, 1826. *Respondent's Authorities.*—White, July 7, 1796. (636.)—Dig. de Recept. l. 17.—Reg. Mag. 2. 5.—1426. c. 87.—1 Bank. 23. 9.—Gordon, Nov. 30, 1716. (655.)—Middleton, June 9, 1791. (Rob. Ap. Ca. 391.)—Dunsmore, July 30, 1745. (656.)—Gardiner, Jan. 19, 1773. (659.)—Brodie, June 1, 1825.—(4 Shaw and Dunlop, p. 53.)—A. S., December 17, 1788.

J. CHALMER, MONCRIEFF and WEBSTER, *Solicitors.*

No. 29. LADY MARY L. CRAUFURD, Appellant.—*Shadwell.*—*Robertson.*

J. and T. DIXON, &c. Respondents.—*Keay.*—*Jas. Campbell.*

Tack.—Coal.—Reparation.—Stat. 59 Geo. III. 35.—A lease of all the coals within certain lands having been granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands; and power being given to the tenants to erect engines on pits, to draw the water from the coal on any of the adjoining lands, of which the tenants might happen to be proprietors or lessees; and the tenants having worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal-field so let to them; and an action having been brought after the lapse of twenty years from the termination of the lease, concluding that the tenants should be ordained to draw off the water, and erect a barrier, failing which to pay damages,—Held (affirming the judgment of the Court of Session), 1. That the tenants were not bound to leave a barrier; and, 2. That the alternative conclusion for damages did not render a remit to the Jury Court imperative.

May 23, 1826. 1st DIVISION. Lord Alloway.

THE lands of Knightswood and adjoining lands, situated in the county of Dunbarton, belonged originally to the Earl of Craufurd. The strata of coal in them extend, in a rising position, from the lands of Knightswood towards the neighbouring lands, and were formerly worked in common. In consequence of this position, it was found necessary to sink pits on Knightswood, with a view of raising the water, and so to permit the coal to be worked in an ascending direction. The adjoining lands had been sold to different parties; and, in 1769, the late Earl of Craufurd, as proprietor of those of Knightswood, let to Alexander Houston, James Dunlop, and others, 'all and 'whole the coals, seams of coal, and coal heughs, within the said 'Earl his lands of Knightswood and others, lying in the parish 'of Kirkpatrick, and county of Dunbarton; and in consideration 'of the sum of £878 Sterling, paid by the lessees to the said Earl, 'being the total amount of the sum already expended by him 'in working and searching for the said coal, and erecting engines thereon, and of all other advances thereanent, and of 'which he hereby acknowledges the receipt,' for thirty years, from Candlemas 1770. The lessees obliged themselves to pay

a yearly rent of £250 per annum, and 'to work the coal in a May 23, 1826.
'regular, orderly, and workmanlike manner;' and the works to be 'patent, and subject to be visited at all times by the said 'Earl, or any other person to be appointed by him for that ef-'fect.' The tack granted 'full power and liberty to the said 'lessees and their foresaids, of working and winning all the 'coals within the boundaries of the said lands, and converting 'the same and proceeds thereof to their own proper use and 'benefit, and of sinking pits, running levels, erecting fire or 'other engines for raising of water or coals from the said col-'lieries, and making roads,' &c. And it farther contained this stipulation, 'Providing always, as it is hereby specially condi-'tioned and provided, that if, after the expiry of the lease, or 'that the foresaid main coal shall be wrought out and become 'not worth working, and that the fire-engine, and other engines 'then on the premises shall be proper or useful for draining 'the water off from any neighbouring coals of which the lessees 'or any of them, or their foresaids, shall at the time either be 'proprietor or lessee, then the said Earl hereby grants full 'liberty to the said lessees and their foresaids, to continue the 'said engine or engines, and other machinery on his lands of 'Knightswood, and others aforesaid; and that while and so 'long as the coal on the said neighbouring grounds shall con-'tinue to be wrought thereby, the said lessees always paying to 'the tenants of the said Earl any damage they may suffer or 'sustain thereby.'

The tenants entered to possession, and worked the coal under the firm of the Knightswood Coal Company, of which John Dixon, the father of the respondents, Messrs Dixons, became a partner subsequent to the date of the lease.

In 1775, an agreement, in the shape of a contract, was concluded by these parties, whereby the rent was reduced to £160, until Candlemas 1780, and then to be as before, £250, until the conclusion of the lease. It was also provided, that the lessees should have power to give up the lease at the end of 14 or 21 years, on giving six months' previous notice; and the Earl was to have the like power of resuming possession on giving the like notice, if the lessees had not paid up their full rent. In case of either of these events occurring, 'The said 'lessees do hereby covenant and agree that when the said lease 'shall be given up agreeable to the terms thereof, or when the 'possession of said coal shall be assumed by the said Earl or his 'aforesaids, agreeable to the powers herein after granted to them,

May 23, 1826. 'the whole machinery upon the said coal or farm of Knights-'wood, or belonging to the said coal, shall be forthwith removed 'by the said lessees and their foresaids, forth and from the said 'coal, lands, and every part thereof.'

In 1778, a tack was entered into of the Knightswood coal, between the Earl of Craufurd and James Dunlop, one of the partners of the Company, proceeding on the narrative of the original lease, 1769, and the subsequent contract, 1775, and stating that James Dunlop was anxious to have the lease of the coal in his own name, after Candlemas 1784, being 14 years from the commencement of the first lease. 'Therefore, the said 'Earl lets to James Dunlop the foresaid coal for 16 years, from 'Candlemas 1784 to Candlemas 1800, the expiry of the first 'lease, with power to work the said coal, and with the same 'privileges that are mentioned and contained in the said former 'tack.' It was further agreed, that at the expiry of this tack at the term of Candlemas 1800, the Earl should be entitled 'to 'receive performance of the third article of the said agreement 'of 10th and 14th April 1775, with respect to the removal of 'the machinery belonging to the said coal, and the delivery of 'the colliers' houses, engines, and machinery therein-mention-'ed.' This tack contained a renewal of all the other clauses and provisions mentioned in the original tack in 1769, except the clause empowering the lessees, in the event of the main seam being wrought out, to continue the engine on the ground, if it should be in use for drawing the water from any other coal-fields of which the lessees might be proprietors or tenants. Although the tack was in name of James Dunlop, it was truly for behoof of the other partners.

During the currency of these leases, the Company acquired right to the coals in several of the adjoining lands, and among others of Netherton, which they worked in common with that of Knightswood. In 1800, their right to the latter coal terminated, and in that year the Earl of Craufurd granted a lease of the surface of Knightswood to Mr Houston, one of the partners, for 19 years. No new lease of the coal (which it was alleged was exhausted) was granted to any one; and Mr Houston continued to make use of an engine, which had been placed on one of the pits sunk during the currency of the lease on Knightswood, for the purpose of draining the water from the coal which the Company was working in the adjoining lands. The Earl died in 1810, and was succeeded by his sister, Lady Mary Lindsay Craufurd; and although the water was drawn off

by means of the engine on the above pit till the termination of the lease in 1819, yet she did not object to it. In that year Mr Houston removed, and the engine having been taken away, the effect was, that the water descended into the pits of Knightswood from those in the neighbouring properties. May 23, 1826.

Lady Mary Lindsay Craufurd then raised an action against the lessees and partners of the Company, in which, after setting forth that she was proprietrix of the coal and lands of Knightswood, and that the lessees had taken possession of and worked the coal from 1770 to 1800, she stated, 'That during this period, 'the said defenders did illegally, and to the great hurt and preju-'dice of the pursuer, work out the whole boundary, and march 'coal between the coal of Knightswood and the conterminous 'coal-fields to the south, and east, and north, and north-west 'of Knightswood, which boundary and march coal so wrought 'out, ought to have been left as a barrier to save the coal-field 'of the pursuer from being flooded by the water from the wastes 'of the said conterminous coal-fields: That the said defenders 'did also illegally, and to the great hurt and prejudice of the 'pursuer, work out the boundary and march coal between the 'said coal of Knightswood and the coal in the lands of Nether-'ton; and which boundary and march coal should have been 'left as a barrier to save the pursuer's coal from being over-'flowed as aforesaid: That the aforesaid coal-fields and the coal 'in the lands of Netherton are to the rise of the coal of Knights-'wood: That the said defenders, who are lessees or proprietors 'of the said conterminous coal-fields, having wrought the coal 'in the said fields, the water coming from the said coal-fields 'did of consequence discharge itself into the waste of Knights-'wood, which was wholly exposed to said water by the illegal 'operations of the defenders, in working out the boundary and 'march coal, which ought to have been left as a barrier afore-'said. That in consequence of the said waste of Knightswood 'being thus overflowed with water, the pursuer is prevented 'from working the remaining large and valuable seams of coal 'lying in her said lands of Knightswood.' Upon this medium, the summons concluded against the defenders, 'Either to re-'lieve the pursuer's coal of the said water, and that by drawing 'the accumulated water which has been introduced, and making 'a barrier in place of that which has been removed by the de-'fenders as aforesaid; and besides, to pay all the costs, skaith, 'and damages which have already been occasioned by the said 'illegal workings; and failing the said defenders so relieving

May 23, 1826. 'the pursuer's coal of the said water, as said is, they ought and 'should be decerned and ordained by decree foresaid, to make 'payment to the pursuer of the sum of £28,000, being the esti- 'mated value of the coal of Knightswood in name of damages, 'for the injury and loss sustained by the pursuer, by the afore- 'said illegal operations.'

In defence, the defenders referred to the terms of their leases, and maintained that they were entitled to work, dig, carry off, and apply to their own use, all the coal in the lands of Knightswood, without exception; that, as the power of constant inspection was reserved to the landlord, it must be presumed that he exercised that power, and acquiesced in, or homologated, the proceedings of his tenants; that, from the terms of the lease, it was plain that the landlord consented that the water in the neighbouring coal-fields should be allowed to communicate with the workings at Knightswood; that, in point of fact, such a communication did exist antecedent to the date of the lease, or at least prior to the date at which any of the defenders, or those whom any of them represented, were connected with Knightswood.

The Lord Ordinary appointed the pursuer to give in a condescendence of all the facts and circumstances she alleged and offered to prove in support of her libel, and to state the periods of the alleged encroachments; and therewith to produce all the writings upon which she meant to found; and directed parties to be heard on the relevancy and legal effect of the different facts stated in their pleadings.

Thereafter, his Lordship remitted, before answer, to 'Robert 'Bald, civil engineer and coal viewer, to visit and inspect the 'subjects in question, and to report his opinion:—1mo, What 'is the usual barrier left betwixt adjoining coal works belonging 'to different proprietors, so as to prevent a communication be- 'twixt them? And whether, by inspection or otherwise, he can 'ascertain if any barrier was left betwixt Knightswood and the 'adjoining coal-field? And if so, of what thickness or extent 'the barrier was?—2do, Whether the coal at Knightswood, or 'the seams of coal that run through Knightswood, and are now 'wrought in the adjoining properties, are of so porous a nature, 'that if a barrier had been left, it would have been insufficient 'to prevent the communication of the water?—3tio, If the lease 'of the works in question gave a right of communicating the 'levels from Knightswood to the adjoining fields of coal pos- 'sessed and wrought by the tenants of Knightswood, whether

'from the porous nature of the coal, or the lie or dip of the May 23, 1826.
'same, would the whole water of the adjoining coal-field fall
'upon the coal at Knightswood, belonging to the family of
'Craufurd; and whether, after the expiry of this lease, this
'could not be prevented by ordinary means?—4to, Whether
'these levels could not be communicated without injuring the
'coal at Knightswood at the expiry of the lease; and whether,
'in ordinary cases, this privilege could not have been withdrawn,
'and the levels stopt or built up at the expiry of the lease when
'that privilege ceased? and if so, to describe in what way, ac-
'cording to his opinion, this might have been effected.—5to, To
'report upon the present state of Knightswood coal, belonging
'to the pursuer, whether it can be made workable in general,
'and at what expense this could be effected; whether from in-
'spection or otherwise, he can form any opinion as to the ex-
'tent of the coal at Knightswood still unwrought; and whether
'any part thereof could at present be wrought? and authorises
'Mr Bald to examine the whole coal-works in the adjoining pro-
'perties occupied by the defenders or others, from which he can
'derive any information with regard to the subjects as to which
'he is to report.'

This remit was objected to by Lady Mary Craufurd, who stated, that as the coal was entirely drained, Mr Bald could only report from the information of others, but she did not complain of it either by representation or petition, and she attended Mr Bald by her agent. After making an investigation, he reported on the different points remitted to him by the Lord Ordinary, and, in particular, that the march consisted, in the part above the main coal, of a porous sand-stone; and, 'with regard to the usual barrier of coal left betwixt ad-
'joining coal-works belonging to different proprietors, so as
'to prevent a communication betwixt them, he stated, that
'there is no rule I know of for regulating the thickness of such
'barriers, or for leaving any barriers whatever along marches.
'If barriers are to be left, it is the common practice to stipulate
'in the lease what is the least thickness these barriers must be,
'and unless the quality and texture of the coals are known, it
'is not possible to decide what thickness of barriers will be suf-
'ficient, as some barriers only three or four fathoms in thick-
'ness will prevent water passing through, owing to the close-
'ness of the coal in its texture; while, on the other hand, a
'coal very open and full of fissures will not keep back water,
'even though the barriers were 100 fathoms thick; besides
'which, the transit of the water through the barrier will be

May 23, 1826. 'quicker or slower according to the altitude of the water kept 'back in the old wastes. No barriers whatever have been left 'by the Knightswood Coal Company along the marches, either 'in the Knightswood estate, or along the marches of the estates 'immediately adjoining, where the coal was wrought by the 'Knightswood Coal Company. The main coal has been wrought 'in continuation from Knightswood into the adjoining proper-'ties as one and the same coal-field.' He also stated, that it was impossible, from the porous nature of the boundary, to work the coal, and at the same time leave an effectual barrier; and having on the other points reported unfavourably for Lady Mary Craufurd, she contended, that she was entitled to have the facts ascertained by the verdict of a Jury; the more especially as her summons concluded for damages. The Lord Ordinary having reported the case on informations, the Court approved of Mr Bald's report, assoilzied the defenders, and found expenses due. And to this judgment they adhered on the 3d of February 1824.*

Lord Hermand.—The object of Lady Mary seems to be to quash the whole proceedings that have been formerly had, and to get the case sent to a Jury. But I am of opinion this wont do. There is enough already in this case to enable us to decide it. She says, this is a pure action of damages. It is no such thing. It depends upon points of law; and I agree with the observations in the answers, that there is no question of fact for a Jury to decide here. The whole coals were let to the tenants; and the conclusion of the action is for replacing that barrier which has been removed in working that coal. But that is not a question of fact. It is a question as to the interpretation of a lease or leases, which do not say a word about barriers, or restrict the tenants from working any part of the coals. Besides, the lease expressly reserved a power to the proprietor to watch the proceedings of the tenants, and to superintend the working of the coal; and by the report of the inspector the parties were to be regulated. She might have done so herself, or she might have sent down an engineer for that purpose. But she did not do either; and it is now too late to complain. This property was surrounded with coal on all sides, and I see no reservation in the lease of any barriers.

Lord Succoth.—I am clearly of the same opinion. There does

* See 2 Shaw and Dunlop, No. 631.

not seem to me to be any occasion for sending this case to the Jury Court. It is not properly a case of facts, but of law. There is no occasion here for going upon the general question of law, how far it is necessary for a tenant or proprietor of coal to have a barrier between his own coal and that of his neighbour. That was the case of Sir John Hope. It rather appears to me that the Court decided that case on the general question of law. But it is not necessary to go into that question here, for there is a clause in these leases which appears to me sufficient to regulate the matter itself. The clause in substance gives right to work out the coal without leaving any barriers. After this lease expired, a large engine was continued working for a very considerable number of years, for the express purpose, and for the only purpose, as I can see, of drawing the water from the coal of the conterminous heritors. During all this long period, this party had it in her power to object to, or to bring her complaint, if she thought that this clause in the lease was not available to the tenants. She must have known the use they were making of the engine; and by that engine remaining during so long a period, she must have known that the party was making that use of it, for the express purpose of drawing the water from the coal of the other proprietors. But no objections were made during all that time. This is of itself a strong feature in the case. It is, I think, a very strong act of homologation on the part of Lady Mary, as she must have known the purpose for which the engine was working. That being the case, it does appear to me that this clause in the lease goes very far to regulate this case. On the facts Mr Bald's report is decisive. No doubt it is said he did not go down the pits. But he could not do so; and therefore he took the best information which he could get. There were, however, some things which he could see, and which are material in the case. He saw that the boundary was of a porous nature, and that it was impossible to make a barrier without leaving the greater part of the coal unworked. But the lease has no limitation, and it would have been extraordinary if the tenants to whom the whole coal was conveyed were only to have right to work a small part of it. I agree in opinion with Lord Hermand, that this is not an action of damages. It is an action concluding for replacing the barrier. There is only a subsidiary conclusion for damages, provided the barrier is not replaced. This is the plain meaning of it. The right to work with or without the barrier is not really the question here. But at all events, that is a question of law, not of fact.

May 23, 1826.

May 23, 1826. *Lord Balgray.*—There is no doubt that Mr Bald had ample means of reporting on various circumstances of importance; but I have some doubts whether a tenant is not bound at common law to leave a barrier. In the circumstances of this case, however, it seems to have been understood that no barrier was to be left, because the water from the pits of the conterminous proprietors was to be drawn out by means of the engine on Lady Mary's pit.

Lord President.—Mr Bald's report is quite satisfactory, and much more so than a proof before a Jury. Indeed, I don't see how any one could have charged a Jury on the subject without his aid.

Lord Gillies.—I am of the same opinion.

Lady Mary appealed.

Appellant.—It is necessarily implied in the nature of location, that the tenant is to use the subject according to the rules of good management, and not deprive the landlord, after the expiry of the tack, of the means of using the subject located, advantageously and profitably. And nowhere is the most strict adherence to these rules so requisite as in coal-works. The respondents were bound to have left a sufficient barrier to have protected the pits from being flooded by the water descending from the conterminous mines. The appellant's charges are explicit and relevant in law to found a claim of damages. Nothing short of the lapse of the long prescription could cut off her claim. The moment the discovery of the respondents' illegal workings and encroachments was made, the suit was instituted. Both conclusions of her action involve a claim of damages for injury done to lands; and therefore, by the Jury Court Act, the Court of Session were bound to have remitted it to a Jury. Mr Bald's report was founded on hearsay; and the pretended facts on which it proceeded, were given by witnesses neither examined on oath, nor cross-examined; and the appellant offers before a Jury to prove the report to be utterly erroneous, and the conclusions in her action well founded.

Respondents.—The works were all along patent to the landlord. The late Earl lived until 1810, and no complaint having been made, it is now too late to seek damages. The appellant is barred by homologation and personal objection. The lease gave the lessees power and liberty of working and winning all the coals within the boundary of the lands; and neither by law nor in practice is a lessee bound, without an express stipulation

for the purpose, to leave a barrier. The clause empowering the lessees to continue the engines on the grounds, if such machinery would be useful to drain off the water from the neighbouring coals, implies, that the Earl knew that no barrier was to be left. As to the shape in which the question has been tried, Mr Bald proceeded on the best evidence, and accompanied by the agent for Lady Mary. There was no room nor necessity for a remit to the Jury Court. This is truly an action ad factum prestandum—to make a barrier in place of the one removed. To this, the conclusion for damages is merely subsidiary. There are, besides, legal pleas sufficient to warrant the dismissal of the action. It would obviously have been most inexpedient to have remitted an inquiry like the one sought for to the Jury Court. May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, but without costs.

Lord Gifford.—My Lords, there is another case which has been under your Lordships' consideration, in which Lady Mary Lindsay Craufurd is the appellant, and Jacob Dixon and a great many other persons are the respondents. It is an appeal from a judgment of the Court of Session, in an action brought by Lady Mary Lindsay against the several respondents, by which she sought to have it declared that the respondents, who are the lessees of a coal-work, in which the late Earl of Craufurd was interested, and which now belongs to her, called Knightswood, should be compelled either to relieve the pursuer's coal of water, by draining the accumulated water which had been introduced, and make a barrier in place of that which had been removed by the respondents; and, besides, to pay, all the costs, skaith, and damage, which had been occasioned by the illegal workings; and failing to do so, that they should be decerned and ordained by decree to make payment to the pursuer of a very large sum of money,—£28,000 being the estimated value of the coal, in the name of damages, for the injury and loss sustained by the pursuer.

It appears that the lease, or rather leases, (for there were two or three, under which this coal was worked,) were granted so long ago as the year 1775; and that they terminated so long ago as the year 1800—nearly twenty years before the commencement of this action. This action was commenced by Lady Mary Lindsay Craufurd in the year 1820. She then complained against the successors of this company (for most of them were dead), contending, that at the time they had the possession of her coals in Knightswood—the coal belonging to her ancestors—they had worked their coal, and, at the expiration of their lease, did not leave a barrier to save her coal-field from being flooded by the water from the waste of the conterminous coal-works; and that by reason of such a barrier not being left, (which, she says, it was their duty to have left,) the water flowed in upon her remaining coal; and in consequence of this, her remaining coal has been completely drowned, and that she sustained a

May 23, 1826. great injury. They, on the contrary, contend, that under their tack, the whole coal in Knightswood was granted to them; that although certainly by that lease they obliged themselves to work in a regular, orderly, and workmanlike manner, yet that stipulation on their part was accompanied with the stipulation, that their works should be always open, subject to be visited at all times by the Earl of Craufurd, the then proprietor, or any person to be appointed by him; and they further said, that in this lease to them was contained a power of making a communication between that coal-work, and other coals they were then working; and that they were not only to be at liberty to put down fire-engines for raising the water and coal, and so on, during the lease; but that even after the lease expired, if they should find it necessary to continue the working of the fire-engine, and other engines then on the premises, for draining the water off from any neighbouring coals, of which the lessees, or any of them, should at the time be either proprietor or lessee, then the Earl granted full liberty to them to continue the said engine or engines, and other machinery, on his lands of Knightswood. Therefore, they said, that looking at this lease, not only was there no stipulation binding them to keep up a barrier between this coal-work and the conterminous coal-works, but there was a positive permission given to them to communicate between their coal-works, and the conterminous coal-works, and that they were therefore to be permitted to continue that communication for the purpose of being enabled to work, and to take advantage of conterminous coal-works.

My Lords, on this matter coming before the Lord Ordinary,—Lord Alloway,—he directed the pursuer to give in a condescendence, framed in terms of the act of sederunt, of all the facts and circumstances she alleged and offered to prove in support of her libel—to state the periods of the alleged encroachments,—and to produce all the writings upon which she meant to found; and then he pronounced an interlocutor, appointing the cause to be enrolled, and parties to be heard upon the relevancy and legal effect of the different facts stated in the papers.

The Lord Ordinary having afterwards resumed consideration of the condescendence and answers, revised condescendence and answers, and the whole process and productions, before answer, remitted to Mr Robert Bald, civil engineer and coal-viewer, to visit and inspect the subjects in question, and to report his opinion.

I do not perceive that any representation was made by Lady Mary Craufurd against this remit to Mr Bald; but on the 20th December 1821, there is another interlocutor: 'The Lord Ordinary having called the 'cause, heard the counsel for the parties, and considered what is stated 'in a letter from the pursuer, Lady Mary Lindsay Craufurd, which let-'ter is put into process, allows each party, if so inclined, to have a coal-'viewer or other scientific person in attendance, at the inspection to be 'made by Mr Bald.' She wished to have Mr Bald attended by a coal-viewer, for the purpose of assisting him in the inspection of those works; and that each party should be allowed to nominate one.

My Lords, it appears that Mr Bald made a very elaborate report, the substance of his report being in favour of the respondents; but Lady Mary Craufurd insisted that no attention should be paid to it, and that, under the circumstances, she was entitled to have the cause remitted to the Jury Court; and that this being in the nature of an action for damages, it should go to the Jury Court, in order to have the facts ascertained. May 23, 1828

Upon that occasion, the Lord Ordinary pronounced the following interlocutor:—(His Lordship then recapitulated the interlocutors of the Lord Ordinary and the procedure in the Inner House.)

My Lords, on looking at the opinions which the Judges pronounced upon the second occasion, it appears, that on considering the original tack, the nature of the engagements entered into in that tack, the nature of the property leased, and the power given by the lessees, they seem to have thought, that looking at the lease itself, they ought to have assoilzied the respondents from this claim. It appears, however, as I have stated to your Lordships, that a remit had been made by the Lord Ordinary to Mr Bald, upon which the report that I have referred your Lordships to had been made by him; and on that proceeded the judgment of the Court of Session originally.

It does appear to me, certainly, that it is extremely important, considering the nature of this action, and the nature of the present claim, to call the attention of your Lordships to the tack itself. The first tack is so long ago as the year 1769; and by that my Lord Craufurd let to those parties 'all and whole the coals, seams of coal, and coal-heughs, within the said 'Earl his lands of Knightswood, and others lying in the pariah of Kil-'patrick and county of Dunbarton; and in consideration of the sum of '£878 Sterling, paid by the lessees to the said Earl, being the total 'amount of the sums already expended by him in working and searching 'for the said coal, and directing engines thereon, and of all other ad-'vances thereanent; of which he thereby acknowledges the receipt'—that is, a lease for thirty years, which would expire at Candlemas 1800. And then there is a condition on the part of the lessees, 'that they will 'work the said coal, and all the parts thereof, in a regular, orderly, and 'workmanlike manner; and the said work shall be patent, and subject 'to be visited at all times proper by the said Earl, or any other person to 'be appointed by him for that effect.' Your Lordships perceive, therefore, that this was a lease of all the coals within those lands of Knightswood. It gave, therefore, a right to the tacksmen to work out the whole of the coal. My Lords, if it had been intended on the part of the Earl of Craufurd that a portion of that coal should not be touched, and that it should be left as a barrier, it was perfectly competent for him, at the time this tack was executed, to have inserted a stipulation to that effect in the tack. Your Lordships find, however, that the only stipulation is, that they should work the coal in 'a regular, orderly, and workmanlike manner.' Now, my Lords, in this case, Lady Mary Lindsay Craufurd does not proceed in her action on any supposed stipulation in that

May 23, 1826. agreement; but she contends, that, independent of that, there is a duty which custom or the common law imposed upon the tacksman of a mine, at all events to leave a barrier between the lands he is working and the adjoining lands, to prevent the water from the adjoining lands flowing in upon the coal; but your Lordships will perceive, that in the latter part of the tack, there is an express provision made for a communication to be made between this work and the adjoining works. Now, it will be quite inconsistent and incompatible with that provision, that a barrier should be left all round this mine, of a sufficient thickness to prevent the entrance of the water; for if that were so, it was impossible for them to work out the whole of the coal. They are permitted, after the expiration of their lease, still to use the fire-engines they have erected, for drawing off the water from the conterminous mines; and there is no stipulation whatever, that after the purpose has been answered, for which that stipulation has been introduced, namely, the drawing off the water from the conterminous mines in their working, they shall then reinstate the barrier in that part. But it is left for them to determine when they will cease to work the fire-engines for the drawing off the water; for there unquestionably is no stipulation in that tack, or the subsequent tacks, imposing upon them an obligation, after that purpose shall have been answered, to make any barrier to prevent the water flowing in from the conterminous mines. And your Lordships will recollect, that the works are to be carried on under the inspection, if he thinks fit, of my Lord Craufurd. They are to be patent at all times, and, therefore, he had an opportunity of going at all times to see how they were proceeding.

The lease expired in 1800, and till this claim set up by Lady Mary Craufurd, there has been no complaint of the manner of working, or of any conduct on the part of these lessees. I do not say that period of time is sufficient of itself to preclude Lady Mary Craufurd from sustaining the action; but it is a question, whether she can maintain the action under the terms of this lease, if she stood by, and saw how they were working this coal, and did not make complaint, and did not call on them to leave this barrier. It is a very strong thing to say, that, under those circumstances, Lady Mary Craufurd, at the end of nineteen years, shall be permitted to call upon them; and let it be recollected, that the action is to compel them to reinstate this barrier, which, according to her summons, she contends it was their duty to have left; and therefore, unless she can make out that they were bound to do so, I apprehend she cannot maintain this action. Her allegation is, that this Knightswood Coal Company having made this mine, 'did also illegally, and to the great 'hurt and prejudice of the pursuer, work out the boundary and march-'coal between the coal of Knightswood and the coal in the lands of Ne-'therton, and which boundary and march-coal should have been left as a 'barrier to save the pursuer's coal from being over-flooded.' Now, in the first place, as I have stated, all the coal was to be permitted to be worked; and it would be flying in the face of that instrument to say, that the law implies an exception which does not appear from the face of the

grant itself, as arising from a general custom or usage, when, if Mr Bald's report is to be attended to, he reports that there is no such custom—that it is rather an exception—that it is rather a stipulation contracted for on the part of the landlord, than an obligation on the part of the lessee. But I am rather inclined to wish your Lordships to view this case as arising out of the terms of their tack, than out of the report of Mr Bald. May 23, 1826

For Lady Mary Craufurd it is contended, that this was an action for damages, and that, therefore, it was compulsory on the Court of Session to have sent it to the Jury Court. I am not disposed to concur in that view of the case; for it is not simply an action for damages; it is an action for damages in one alternative; but the main object of the action is not for damages, but that the lessees shall actually draw off the water, which has been introduced in consequence of their not keeping the barrier; that they shall relieve the pursuer's coal of the water by drawing off the accumulation of water which has been introduced, and by making a barrier in the place of that which has been removed; and then the pursuer goes on to say, that, if they do not relieve her in that respect, they ought to be mulcted in damages. But her leading requisition in the summons is, that they shall relieve her land from the water, and make this barrier. The Court of Session, therefore, thought that the act of Parliament, applying to a claim for damages only, did not apply to this case, and that the case ought not to be sent to a Jury. It appears, that to the interlocutor referring the matter to Mr Bald, as I have already stated, no complaint was made on behalf of Lady Mary Craufurd, except that she wished to have a person there to assist in the inspection. She made no complaint by a reclaiming petition to the Court of that appointment.

Upon the whole, it does appear to me, that this is not a case in which the pursuer could, in that stage of the cause, compel the Court of Session to transfer this case to the Jury Court. Then the question is, upon the fair construction of this lease, and the conduct of the parties, whether Lady Mary Craufurd had a right of action in this case. Now, I shall read to your Lordships the opinions of some of the learned Judges upon this case when it was last before them.—(His Lordship then read the opinions of Lords Hermand and Succoth.)

My Lords, upon the fullest consideration I have been able to give to this case, conceiving as I do that the lease conveyed to the lessees a power of working the whole of this coal—and in construing the whole obligations of the party, you must look at the whole of the stipulations of the lease;—perceiving, also, that, in that very lease, an express power is given to make communications between these and the adjacent mines, it does appear to me impossible to contend that you shall imply an obligation on the part of the tenant, contrary to the express stipulations of the lease, by which he shall be bound to leave barriers round this mine. Because, if Lady Mary Craufurd's construction be right, they could not have worked any of the coal, if it was necessary that coal should be left as a barrier; but they must have been restricted in the enjoyment of

May 23, 1826. the coal, to the extent of that coal which it would be necessary to leave as a barrier against the conterminous mines. There is, however, no such reservation. Then, as I have stated to your Lordships, there is the clause allowing a communication to be made; and it must have been known to Lord Craufurd, or his agent, that it was made. It does appear to me, that the Court of Session were well warranted, therefore, in the interlocutor which they finally pronounced, sustaining the defences of this action, and assoilzieing the defenders; and that they would have been well warranted in coming to that conclusion without Mr Bald's report at all. Mr Bald's report is confirmatory of the opinion the Court of Session entertained upon the obligation of the party to make the barrier; but my opinion does not proceed upon the report of Mr Bald, but the construction of the lease. Indeed, if that report of Mr Bald can be properly looked at by your Lordships, Lady Mary Craufurd, as it appears to me, has very little reason to complain—having concurred as she did in the appointment of Mr Bald; and all she complains of is of Mr Bald having decided on hearsay evidence. But she says, 'I do not ask you to refer it back 'again to Mr Bald, or any other person; for I insist, that though you have 'referred it to Mr Bald, and have got his report, it is a case which never 'ought to have gone to Mr Bald; and I insist that the case shall go to a 'Jury, this being an action simply for damages, and therefore falling under 'the act of Parliament.' My Lords, the Court of Session well knew, that this was not compulsory upon them; and looking at the nature of this action, and seeing that there were defences in point of law which rendered it unnecessary to direct any inquiry whatever into the fact,—their opinion being, that, in point of law upon the construction of the lease, that lease gave the lessees a power of working out all the coal, there being no reservation in it binding them to leave part as a barrier, but only that they should work the coal in a workmanlike manner. The defences were sustained on the part of the respondents, and the Court assoilzied them.

My Lords, I do not enter into topics of hardship which have been urged in this case. These respondents, it appears, were united in a concern in which they represented a great variety of persons. Your Lordships, I know, cannot entertain questions of that sort; but after such a lapse of time as has occurred, from the year 1800 to 1819, when this action is commenced, I think it was incumbent on the Court below to watch with some jealousy the nature of such an action. Had it been brought much earlier, Lady Mary Craufurd would not, in my opinion, have been able to establish any case, considering the terms of this lease. In the fair construction of the stipulations entered into by those parties in this case, I am of opinion that there is no ground for saying that the Court can imply, or that your Lordships can imply, an exception of any coal to make a barrier; and particularly when there was a power given to the tenants to make a communication between this coal in Knightswood and the conterminous coal-works.

Though it is not always usual to go into so much detail, in cases where the individual who addresses your Lordships means to move to affirm the

judgment, I was anxious in this case, because it is a case of great import- May 23, 1826.
ance in point of value, to state to your Lordships the reasons which influenced me in moving your Lordships to affirm the judgments, and to assoilzie the defenders. It is not my intention to say anything on the subject of costs, but simply to affirm the judgment of the Court of Session.

Appellant's Authorities.—3 Erak. 2. 16.—Lord Wemyss, Feb. 2, 1800. (F. C.)—4 Erak. 1. 14.—29. 12.—2 Stair, 7. 10.—59. Geo. III. c. 35.
Respondents' Authorities.—Williamson, Aug. 4, 1761. (10459.) Dict. vol. I. 378.—Ayton, May 19, 1801. (App. No. 6. Property.)—Kinnoul, Jan. 18, 1814. (F. C.)—Bayne, Dow's Reports, III. 233.

J. CHALMER—SPOTTISWOODE and ROBERTSON, *Solicitors*

SIR MICHAEL SHAW STEWART, Bart., Appellant.—*Fullerton—Keay.* No. 30.

JAMES CORBET PORTERFIELD, Esq. *Respondent.*—*D. of Fac. Cranstoun,—Murray.*

Tailzie.—Faculty.—Prescription.—A party having executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; and thereafter having made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution heredibus nominandis; and the estates having been possessed for more than forty years on the entail alone, without reference to the deed of nomination; the Court of Session held that the deed of nomination was a valid exercise of the faculty to name heirs—that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. But the House of Lords remitted for the opinion of both Divisions.

ALEXANDER PORTERFIELD possessed the lands and barony May 24, 1826.
of Duchal, in the county of Renfrew, under a contract of mar- 2D DIVISION.
riage in 1693 with Lady Catherine Boyd, and by which they were destined to the heir of the marriage. His superior in the greater part of the property was the Earl of Glencairn—one portion, the Overmains of Duchal, held of Cochrane of Kilmarnock, who again held of the Earls of Glencairn. He was also superior of the lands of Porterfield and Hapland, yielding inconsiderable feu-duties.

May 24, 1826. Alexander Porterfield had two sons,—William and John,—and three daughters, Jean, Eupham, and Catherine. John predeceased his father, leaving an only son, Boyd.

William, in 1719, married Miss Julian Steel, under certain articles of marriage, in fulfilment of which a formal contract of marriage, in the shape of a deed of entail, was executed in 1721, by which her father advanced 10,000 merks as tocher, and conveyed his estates to the spouses and the heirs of the marriage in fee; while, on the other hand, Alexander Porterfield bound and obliged 'himself, and his heirs and successors, with all possible 'diligence, upon his own proper charges and expenses, duly and 'validly to infeft and seise the said William Porterfield, his said 'son, and the said Julian Steel, spouses, and longest liver of 'them two, in conjunct fee and liferent, and the heirs-male pro-'created, or to be procreated of the said marriage; whilk fail-'ing, the heirs-male of the body of the said William Porterfield 'of any other marriage; whilk failing, the heirs-male of the 'body of the said Alexander Porterfield; whilk failing, the 'eldest heir-female of the body of the said William Porterfield, 'and the descendents of the body of the said eldest heir-female 'without division; whilk failing, the next heir-female succes-'sive of the body of the said William Porterfield, and the de-'scendents of her body, all without division; whilk failing, any 'other heirs of tailzie to be nominated and appointed by the 'said Alexander Porterfield, by writ under his hand, at any 'time in his lifetime, in his liege poustie; whilks failing, the 'eldest heir-female of the body of the said Alexander Porter-'field, and the descendents of the body of the said eldest heir-'female, without division; whilks failing, the next heir-female 'successive of the body of the said Alexander Porterfield, and 'the descendents of the body of the said next heir-female, with-'out division; whilks also failing, the said William Porterfield 'his nearest lawful heirs and assignees whomsoever: but al-'ways with and under the reservations, conditions, limitations, 'and clauses irritant and resolutive, which are appointed to be 'inserted and contained in the procuratories and infeftments of 'resignation, precepts and instruments of seisin, charters, ser-'vices, retours, infeftments, and others to follow hereupon, viz. 'reserving to Alexander Porterfield his liferent of the manor-'place of Duchal, and lands therein described; reserving to him 'also full power and faculty to grant liferent infeftments to any 'other spouse, and to make provisions for children of any after 'marriage, or to burden the estate with debts, all in the man-'ner, and to the extent therein provided: And further, reser-'ving full power and liberty to the said Alexander Porterfield

'at any time in his liege poustie, to alter, innovate, or change May 24, 1826.
'the order, course, and succession of the haill heirs of tailzie
'above specified, except the heirs male and female of his son's
'body, and the heirs-male descending of his own body, and that
'by a writ under his hand, notwithstanding of this present
'right of fee, and infeftment to follow hereupon, in favour of
'the said William Porterfield, and the heirs of tailzie above spe-
'cified; declaring always, that the said William Porterfield,
'and his heirs and successors, shall be obliged to take the rights
'and infeftments of the said lands and others, with the burden
'of the irritancy and provisions herein contained, to and in fa-
'vour of such heirs of tailzie as the said Alexander Porterfield
'shall so nominate and appoint, failing the heirs male and fe-
'male of the said William Porterfield's body, and the heirs-
'male of the body of the said Alexander Porterfield, as said is;
'as to which heirs male and female of the body of the said
'William Porterfield, and the heirs-male of the body of the said
'Alexander Porterfield, the foresaid succession is hereby de-
'clared unalterable by the said Alexander Porterfield, or by the
'said William Porterfield and the heirs of tailzie above men-
'tioned.'

The contract contained the usual clauses of a strict entail, ordaining the heirs to bear the name and arms, not to alter or change the order of succession, nor to sell or contract debt, under irritant and resolutive clauses, expressed in the proper and accustomed terms. It was recorded in the register of entails on the 3d of April 1722, and infeftment was taken on the precept in all the lands contained in it on the 1st of May thereafter.

Thereafter Alexander Porterfield acquired the lands of Blacksholm, and others; and his eldest son William having had no issue by his marriage, and Jean, his eldest daughter, having married James Corbett of Towcrosse; and the other daughters being also married; he executed a new deed of entail in 1737, adding the newly-acquired lands to the above entailed estate, and calling, 1st, The heirs-male of his son William's body; 2d, His grandson Boyd by name, and the heirs-male of his body; 3d, His own three daughters by name, and the heirs-male of their bodies; 4th, The heirs-male of the bodies of Porterfield of Fullwood and Hapland; 5th, The heirs-female of the body of William Porterfield; whom all failing, William's heir or assignees whomsoever.

This deed, however, was superseded by another deed of entail, which he executed on the 5th of November 1742, proceeding on

May 24, 1826. the narrative of the marriage-contract 1721, and the reserved power therein contained, 'to alter and change the order, course, 'and succession of the haill heirs of tailzie above specified, (ex- 'cept the heirs male and female of my son's body, and the heirs- 'male descending of my own body,) and that by writ under 'my hand; and my said son, and his heirs and successors, are 'obliged to take the writs and securities according as the said 'bond of tailzie, and alteration of the succession sua to be made 'by me, in itself more fully bears;' and then bearing—'And 'seeing, that since making the foresaid bond of tailzie of my 'foresaid estate, I have purchased the ten shilling land of 'Blacksholm, &c. and being resolved to adject, eik, and add the 'saids new purchased lands to my tailzied estate above speci- 'fied, with and under the same clauses and provisions mentioned 'in the foresaid bond of tailzie, but with the alteration, change, 'and innovation of the order, course, and succession therein 'contained, and above repeated, in so far as is inconsistent with 'the order, course, and succession under written, which is here- 'by declared to be the order, course, and succession to my fore- 'said estates and lands, both old and new, with and under the 'additional clauses and provisions after specified: Therefore wit 'ye me to be bound and obliged, as by thir presents, with and 'under the express provisions, burdens, reservations, conditions, 'declarations, restrictions, limitations, clauses irritant and reso- 'lutive mentioned in the foresaid bond of tailzie, contained in 'the foresaid contract of marriage, and also with and under the 'express provisions, burdens, and conditions under written, 'hereby appointed to be contained in the writs and securities 'to follow hereupon, I bind and oblige me, my heirs and suc- 'cessors whatsomever, duly and validly to infeft and sease the 'heirs-male of the body of the said William Porterfield, lawful- 'ly procreate or to be procreate of his present or any subsequent 'marriage, (secluding always the said William Porterfield him- 'self from any succession to the said late purchased lands,) and 'failzeing heirs-male procreate or to be procreate of my said 'son's body, Boyd Porterfield, my grandson, and the heirs- 'male lawfully to be procreate of his body; whilks failzeing, to 'the heirs-male of the body of Alexander Porterfield of Full- 'wood, my uncle; whilks failzeing, to the heirs-male of Ga- 'briel Porterfield of Hapland, my cousin, and that because I 'reserve (reserved) to myself a power to name the subsequent 'heirs of tailzie after my son William Porterfield, and his heirs, 'as aforesaid; and that it is known that the estates of Fullwood 'and Hapland, by a clause in their several dispositions, are to

'return to the heirs-male of my family, failzeing the heirs-male May 24, 1826.
'of their families, by which my ancestors' anxiety to preserve
'their estates and family in their own names and heirs-male
'plainly appears; whilks failzeing, Jean Porterfield, my eldest
'daughter, spouse to James Corbet of Towcrosse, and the heirs-
'male lawfully procreate or to be procreate of her body; whilks
'failzeing, Eupham Porterfield, my second lawful daughter,
'spouse to Emanuel Walker, collector of his Majesty's Customs
'at Port-Glasgow, and the heirs-male lawfully procreate or to
'be procreate of her body; whilks failzeing, Catherine Porter-
'field, my youngest daughter, spouse to James Baird, merchant
'in Glasgow, and the heirs-male lawfully procreate or to be pro-
'create of her body; whilks failzeing, the eldest heir-female law-
'fully procreate or to be procreate of the body of the said William
'Porterfield, my son, and the descendents of her body, without
'division; whilks failzeing, the next heir-female of my son's
'body successivè, and the descendants of their bodies succes-
'sivè, without division; whilks failzeing, the eldest heir-female
'of the body of the said Boyd Porterfield, my grandson, and
'the descendents of his body, without division; whilks failze-
'ing, the next heir-female of the said Boyd Porterfield, and the
'descendents of her body successivè, without division; whilks
'failzeing, the eldest heir-female of the body of the said Alexan-
'der Porterfield of Fullwood, and the descendents of her body,
'without division; whilks failzeing, the next heir-female of the
'said Alexander Porterfield, and the descendents of her body,
'without division; whilks failzeing, the eldest heir-female of
'the said Gabriel Porterfield of Hapland, and the descendents
'of her body, without division; whilks failzeing, the next heir-
'female of the said Gabriel Porterfield, and the descendents of
'her body, without division; whilks failzeing, the eldest heir-
'female of the body of the said Jean Porterfield, my eldest
'daughter, and the descendents of her body, without division;
'whilks failzeing, the next heir-female of her body, and the de-
'scendents of the next heir-female of her body successivè, with-
'out division; whilks failzeing, the eldest heir-female of the
'body of the said Eupham Porterfield, my second daughter, and
'the descendents of her body, without division; whilks failze-
'ing, to the next heir-female of the body of the said Eupham
'Porterfield, and the descendents of the said next heir-female
'successivè, without division; whilks failzeing, the eldest heir-
'female of the body of the said Catherine Porterfield, and the
'descendents of her body, without division; whilks failzeing, the
'next heir-female successivè of the body of the said Catherine

May 24, 1826. 'Porterfield, and the descendents of the said next heir-female 'successivè, without division; whilks all failzeing, the nearest 'heirs and assignees of the said William Porterfield whatsom-'ever, the eldest heir-female always excluding all other heirs-'portioners, and succeeding without division, heritably and 'irredeemably, in all and haill,' &c.

This deed, although it referred to, did not dispone the lands contained in the contract 1721. It reserved the granter's life-rent, and a faculty to alter, but no clause dispensing with delivery; and it did not appear whether it had been delivered by him or not. He died on the 14th May 1743, and a few months afterwards the deed was recorded in the books of Session as a probative writ.

William had been infeft upon the contract of marriage in the Duchal estate, and in the superiorities of Porterfield and Hapland; and he now obtained a charter of confirmation of the marriage-contract, and seisin following on it, as to all the lands, except Overmains, which he continued to possess under the infeftment on the marriage-contract. He died without issue in 1752, and was succeeded by his nephew Boyd, the grandson of Alexander the entailer.

The titles which Boyd then made up were these: 1. As to the lands of Duchal; he expede a general service, as heir-male of provision to William Porterfield, under the contract 1721, and a general service, as heir of line of Alexander; and in 1757, he obtained a precept of clare constat from the superior, proceeding on a narrative of the contract 1721, and engrossing the reserved faculty to nominate heirs, on which seisin was taken in the same terms; but there was no reference to the deed of 1742. 2. He possessed the lands of Overmains on his apparency simply, never having made up any feudal title. 3. With regard to the superiorities of Porterfield and Hapland, he possessed them on apparency till 1773, when, as heir of line of Alexander the entailer, he expede a charter of resignation, proceeding on the contract of marriage 1721, and the deed of 1742, taking the destination in terms of the nomination in that deed, and he was infeft. In claiming enrolment, however, as a freeholder, he laid aside this title, which was said to be defective, as proceeding on his having right, as heir of line of the entailer, to the procuratory of resignation in the marriage-contract; and therefore he claimed, and was enrolled in 1778 on his apparency. And, 4. He made up titles to Blacksholm in fee-simple, disregarding the deed 1742.

Boyd died in 1795, leaving an only son, Alexander, and se-

veral daughters; the eldest of whom, Margaret, was mother of the late Sir Michael Shaw Stewart. Alexander completed his titles to the lands of Duchal, as his father had done, by a precept of clare constat from the superior, engrossing the reserved faculty of nomination of heirs in the contract 1721, and was infeft accordingly. He made up no titles to Overmains, nor to the superiorities of Porterfield and Hapland, but was enrolled as a freeholder, as apparent heir under the charter and sasine in favour of his father Boyd, in 1773. He died without issue in 1815; and Porterfield of Fullwood, and Porterfield of Hapland, (who were named in the deed 1742,) having also died without issue, the succession of the entailed estate of Duchal now opened to that heir who should be next in succession after the heirs male and female of William's body. May 24, 1826.

Two claimants appeared: 1. Sir Michael Stewart, the son of Margaret Porterfield, eldest daughter of Boyd, who claimed to be preferred, on the assumption that the faculty of nomination was *not* legally and effectually exercised; and therefore that he came in under the seventh substitution in favour of 'the eldest heir-'female of the body of the said Alexander Porterfield, and the 'descendents of the body of the said eldest heir-female, without 'division.' 2. James Corbet, eldest son of John Corbet, who was the eldest son of Jean Porterfield, the eldest daughter of Alexander the entailer; who, assuming that the faculty of nomination had been effectually exercised by the deed 1742, claimed under that nomination, as the heir-male of the body of Jean Porterfield.

Sir Michael Shaw Stewart took out two brieves, by which he claimed to be served as heir of tailzie, and provision to Alexander Porterfield (the son of Boyd), as last vest and seised in the lands of Duchal, and to William Porterfield, the disponee in the marriage-contract, as last vest and seised in the lands of Overmains; and brought a reduction of the titles made up by Boyd in 1773, to the superiorities of Porterfield and Hapland. James Corbett, on the other hand, purchased—1st, a brieve as heir of tailzie and provision to Alexander Porterfield (son of Boyd), in the lands of Duchal; 2d, a brieve as heir of tailzie and provision to William Porterfield, in Overmains; and, 3d, a brieve as heir of tailzie and provision to Boyd, in the superiorities of Porterfield and Hapland.

The brieves having come before the Macers, and two of the Judges of the Court of Session, appointed in common form, as their assessors, a debate ensued on the respective rights of parties, and memorials were ordered to the Second Division. By

May 24, 1826. Sir Michael it was maintained: 1. That the deed 1742 was not a lawful exercise of the reserved power to nominate heirs under the sixth substitution in the deed 1721, the granter having exceeded his powers, and made a new deed altogether; and, besides, it had never been delivered; and, 2. That as the possession of the estate had been all along enjoyed exclusively in virtue of the deed 1721, it formed a good prescriptive title, while the deed 1742 was cut off by the negative prescription. By Mr Corbet it was contended: 1. That although the granter had in part exceeded his powers, yet so far as regarded the nomination of heirs, he had validly exercised them; and, 2. That the deed 1721 formed his title equally as much as that of Sir Michael; because he referred to the deed 1742, merely as evidence to show that he was the party who had right under that of 1721.

The Lord Justice Clerk, after a deduction of the titles, observed.—In deciding in this competition, it is necessary that we should form a clear and distinct opinion as to the nature of the clause occurring in the deed 1721. Upon the most careful consideration of that clause, I am of opinion that it is to be viewed solely as a power to nominate heirs; and, more particularly, that it cannot be viewed, upon any legal principle, as a general power to alter the order of succession. For, attending to the words of that clause, and comparing it with the other clauses of the substitution, it will be seen that the very same language is employed in the substitution in that clause, as in the other branches of the destination. It is a substitution hæredibus nominandis. There are, in this deed, a variety of substitutions hæredibus nascituris. And the same principles that must be applied to give effect to the latter, appear to me to be indispensably necessary to be applied to the former. That this is a legal, a legitimate substitution, I have no doubt. The mode of substitution was common at an early period.

The case of Roxburghe has been appealed to, but it is not similar to the present. That there was a Crown-charter granted in 1643, with a power to the Duke, failing heirs-male of his body, to nominate heirs to succeed him, is a matter of notoriety. Such a power of nomination was common as to honours and dignities in Scotland, and at this moment, a noble Earl, who is present, (Lord Errol,) holds his titles in virtue of such a power, and the exercise of it.

Therefore, as to the power, I have no doubt. I have no doubt it was a legal power, and might be exercised.

It has been said, that this case is the same as that of an entail where the destination is pointed out by a reference to other

entails. The cases are not exactly the same. These cases proceed upon reference to entails existing. That is not the case here. May 24, 1826.

But it is a case precisely the same in principle with those where we have sustained a power to nominate heirs vested in a third party. There, all that is necessary is a writing by the person who has the power of nominating heirs. If so, then a fortiori such power may be exercised by the granter, who has reserved it to himself. Therefore I have not the smallest doubt, that this is not a mere reserved power of alteration, but is an express reservation, to direct the estate to go to the heirs to be named by the maker of the deed.

Considering the nature of this reserved power,—that it is one which may be legitimately exercised;—and that all that is wanting to give it effect, is an instrument in terms of the power under the hand of the granter, executed by him in liege poustie; it follows, that when a party founds upon such an instrument, we must hold that the original deed is the title to the estate. It is the real feudal title, because it alone contains the feudal grant. The power of nomination may be exercised by any writing that appears upon the face of it to be authentic, and to be duly exercised. It may be by a holograph writing of the granter. It might be in the shape of a writing in a few lines, merely declaring he does what he has power to do in reference to the substitution in the original deed. And, from being a substitution to heirs to be nominated, it becomes, after the nomination, a substitution to heirs to be born, and generally designated. That it is necessary to produce an instrument by the maker of the original deed, showing his intention to do what he had power to do, and not liable to objections, is clear. But, in reference to the question of effect upon the title, it can, on legal principle, be looked upon in no other light than as a document necessary to establish that the nomination has been made.

That a person may be called in a destination by a general description, as heir-female, or heir whatsoever, but that such a person cannot at once step into the estate, we all know. Something must be done to prove the title by evidence. On the one hand, a service as heir-female, and, in the other case supposed, a service as heir whatsoever, must be presented to us. That service puts the party in a situation of saying, Here I am, with evidence that I am the person called by the destination in the titles of the estate, which I now claim. In the case, again, of heirs nomi-dandis in a substitution, a claimant of the estate under such destination must show the instrument by which he is nominated. That, however, is not the title to the estate, but the evidence of

May 24, 1826. his connexion with the feudal grant of the estate, and to him it is the same as the other evidence which I have mentioned is to the heir-female, or heir whatsoever.

If it could be said for a moment, that a person nominated as I have described, is obliged to found upon this nomination as his title, it would be a contradiction in terms. If he produce what cannot be called a feudal title, what is it but evidence to show that he comes within the clause of substitution? And if it be said no person can claim the estate who is not named in the destination, look to the deed 1721. One single person only is called by name there, viz. William Porterfield. Every one else is called by description,—as heirs male or female of William, or of the maker of the deed, Alexander. They are all called descriptive except the eldest son of the maker of the deed. I am therefore of opinion, that supposing there is regular evidence, in the shape of a deed of nomination of persons by name or description as heirs under this clause, that writing containing the nomination cannot be considered as the title to the estate, but as the collateral evidence, showing that persons have been nominated for the particular clause of substitution in the original deed.

Keeping these observations in view, you will observe, that Sir Michael Stewart claims this estate in virtue of the deed 1721, as his title to the estate. He states, that possession had followed upon that title in favour of his ancestors; that he is entitled to avail himself of that title and possession; and that it is exclusive of the title produced by Mr Porterfield,—the deed 1742.

Mr Porterfield states, that his claim to be served heir rests only upon the deed 1721, as the real and fundamental title upon which he pleads; but to show he is entitled to found upon it, he produces the deed executed by Alexander in 1742.

As Sir Michael Stewart wishes to make out to your Lordships, that he has, in virtue of the deed 1721, an exclusive and absolute right to Duchal and Overmains, founded upon the positive prescription, we are bound to decide whether or not there is any foundation for such a plea.

First, He states, that the deed 1742 is void and null, from various considerations. Secondly, That the positive prescription has followed upon the deed 1721, to the utter exclusion of the right of Mr Corbet Porterfield.

1. As to the alleged nullity of the deed 1742, quoad the new lands of Blacksholm, &c., it is a deed of entail which was within the power of Alexander to form. He was not under any restriction as to lands which he should acquire after the date of the deed 1721; and these were acquired by the portion of his

second wife. He vested that portion in land, and made a new entail. As to the destination of heirs in the deed 1742, from whatever motives he may have acted, and though he may have attempted to alter what was unalterable in the deed 1721, yet he might make what destination he pleased in the deed 1742, as to the newly-acquired estate. With regard to it, the destination is unexceptionable. May 24, 1826.

But while this was within the power of the maker of the deed of entail as to the new lands, it is equally clear, that in the due exercise of power reserved to him in the deed 1721, of filling up the sixth substitution, he might do so in such a deed of entail as this deed 1742. There is nothing in that power of nomination which might not be exercised in an entail as to other property, if you have evidence that he meant to exercise the power reserved to him.

Look to the deed 1742, and see whether there is not upon the face of it evidence that it was intended both for the purpose of entailing the new lands, and of exercising the power of nominating the heirs who should take the benefit of the sixth substitution in the deed 1721. This is demonstrated on the face of that deed. It says, he was about to declare the order of succession to both estates, and begins with a recital of the persons. Thereafter, having named Porterfield of Hapland and others, he expressly states, 'And that because I reserve to myself a power 'to name the subsequent heirs of tailzie, after my son William 'Porterfield and his heirs, as aforesaid, and that it is known 'that the estates of Fullwood and Hapland, by a clause in their 'several dispositions, are to return to the heirs-male of my family, failing the heirs-male of their families, by which my ancestors' anxiety to preserve their estates and family in their 'names and heirs-male plainly appears.' In the first part of the deed there is a correct recital of the deed 1721; and he here says, 'And being resolved to adject and add the saids new pur-'chased lands to my tailzied estate above specified, with and 'under the same clauses and provisions mentioned in the fore-'said bond of tailzie, but with the alteration, change, and inno-'vation of the order, course, and succession, therein contain-'ed, and above repeated, in so far as is inconsistent with the 'order, course, and succession underwritten, which is hereby 'declared to be the order, course, and succession to my foresaid 'estates and lands, both old and new, with and under the ad-'ditional clauses and provisions after specified.' Here you see there is an express reference, not only to the deed generally, but to the power of nomination in the sixth substitution. And, after

May 24, 1826. having so expressed his intentions, you have the nomination to 'Jean Porterfield, my eldest daughter, spouse to James Corbet 'of Towcross, and the heirs-male lawfully procreate, or to be 'procreate, of her body,' and then to other heirs-female of the granter.

I am clearly of opinion, that the argument, so far as rested on the allegation, that there was here an alteration of what was unalterable, is true and well founded. Though the granter calls Boyd Porterfield as his grandson, he takes no notice of him as his heir-male,—he says nothing of his own heirs-male,—and he puts the heirs-female of William behind Jean Porterfield. These alterations were ultra vires of the granter of the deed in reference to the old estate.

But admitting the fact to be so, it is not pretended that there is now any one in the predicament of being excluded by this alteration. If there were, it would be a most obvious and satisfactory statement in his favour, that, under the deed 1721, which regulates as to the old estate, he should be entitled to be preferred against all the world. Any person showing himself to be an heir-male of Alexander, or heir-female of William, by that or any other marriage, would be preferred under the deed.

Although this was an attempt to do what could not be done, the deed 1742 is correct enough so far as regards the interest of any one claiming as a nominee by it, under the sixth substitution in the deed 1721.

Although it is provided, that the five preceding substitutions in the deed 1721 shall be unalterable by the granter, there is not to be found in the deed 1721, any declaration that any deed which he shall make, in which such an attempt shall be made, shall in other respects be void and null. There is no such stipulation in the deed 1721, but a positive declaration that the five first substitutions shall be unalterable. I do apprehend, that, while it is clear, under the deed 1721, that the rights of the persons supposed to be injured would have been secured, it does not follow, and is not a legal consequence of the abortive attempt to alter what is unalterable, that the deed in which it was made should be declared null. There is no authority for such a proposition.

I apprehend that this may be illustrated. Suppose that Alexander Porterfield, by an instrument much simplified from the deed 1742, and declared to be for the purpose of nominating heirs under the sixth substitution in the deed 1721, had named a variety of persons, some of whom were incapable of holding property by the law of Scotland; I ask, if you could be prepared

to say, that with regard to the remainder of the persons who were capable of holding property, this deed of nomination should be void and null? It would not. You must have found in such a case, that the deed of nomination should receive effect, so far as effect could be given it, according to the law of Scotland, supposing it not liable to any other objections. And I can regard this case in no other point of view, seeing the deed 1721 would have regulated the interest of any persons who might be injured by the deed 1742. The question, therefore, is, whether there is evidence that the purpose of the maker of the deed 1742 was to call Jean Porterfield, and those called after her, in virtue of his power under the sixth substitution in the deed 1721. I think it was a valid nomination; and although an attempt was made at the same time, which, I say, was abortive, I am not able to say that the power reserved to Alexander Porterfield by the deed 1721 has been improperly exercised by the execution of the deed 1742. May 24, 1826.

It is urged, that there are other defects and repugnances, that entitle us to hold that the deed 1742 is null and void. It is said there is an attempt to burden the estate. In looking to the deed, you will find there is no such attempt. The reference is to the new lands.

In the same way, I have to observe, that there is no requisition in the deed 1742 to insert the whole stipulations there given in the investitures of the lands contained in the deed 1721.

As to the powers reserved, they are as to the new estate; therefore there is no ground for saying, that in these particulars Alexander Porterfield wished, by the deed 1742, to infringe upon the deed 1721. I cannot hold the deed 1742 to be a null instrument. On the contrary, it appears to be a valid instrument.

2. The second ground of Sir Michael Stewart's claim is, that he has right by the positive prescription.

If I am well founded in the view I have stated as to the nature of the deed 1721, that it is the title to the estate, and the only one by which either party can have any claim;—that it is common to both, and as much the title of Mr Corbet as of Sir Michael Stewart; it must follow, that there is no title,—no basis upon which the positive prescription can be built,—because the possession which followed upon this deed, by the infeftment of William Porterfield, by the charter of confirmation in terms of the deed 1721, by the entries by precept of clare constat,—can amount to nothing but renewals of the investiture of the deed 1721, and may be founded upon as much by Mr Corbet

May 24, 1826. as by the other party. The real title upon which positive prescription is pleaded, is common to both. Mr Corbet acknowledges, that without it he has no case;—for in the deed 1742 there is nothing like a grant of the old estate,—nothing resembling a disposition of it. Without the deed 1721 he obviously has no case. The deed is common to both parties; and all the possessions that have followed upon it, are as much in favour of Mr Corbet as of Sir Michael Stewart.

But it is obvious, that, in order to found positive prescription, both the title and possession must be shown to be exclusive of the titles and rights of Mr Corbet, and peculiar and inclusive to Sir Michael Stewart.

Now, where is an investiture which does not take in the sixth substitution of the deed 1721? That substitution is in every one of the titles that has been made up since; and therefore, it is in vain to maintain, that there is anything like an exclusive title in the case, on which to found the positive prescription.

It was admitted by the counsel for Sir Michael, that if you be satisfied that the deed 1742 is evidence, and not a title, positive prescription cannot apply. I close with that admission. It is fair, and is necessary; and if the fact be, as was assumed only, that the deed 1742 is evidence, and not a title, then, ex concessis, there is no exclusive title at all, on which to found prescription. The only exclusive title, that, it appears to me, could be founded on in a case of this description, would be, an investiture which had been completed posterior to the deed 1742, and was exclusive of that deed, leaving out the whole of the sixth substitution of the deed 1721, and taking up the succession as if such had never existed. If the forty years had run upon such a title, then there would have been something like a title to exclude. But I discover nothing like that; every one of the titles I have mentioned bearing in gremio this clause, which is the real foundation of Mr Corbet's plea.

But it is said on the part of Mr Michael Stewart, that the deed 1721 takes William Porterfield and the heirs called, bound to insert in the titles to the old estate any nomination of heirs to be named in virtue of the reserved power, and reference is made to irritancies and forfeitures in the deed 1721. That this might have entitled any person founding upon the nomination 1742, to bring a declarator to have it found, that in virtue of that clause a title should be made up, inserting that nomination, and that otherwise the person refusing to make up such title should be subjected to those consequences mentioned in the deed 1721,

may be conceded. Such an action might have been entertained, May 24, 1838.
but was unnecessary, although the party had a title to bring such an action, even without interest; for all the titles that have existed, have embodied in them the substitution in the deed 1721; and nothing has been done to the prejudice of any person who could show, when he came to succeed, that he was nominated under the sixth substitution.

When there is a power to nominate constituted in a valid manner, as in the deed 1721, or in the Roxburghe entail, and when it is exercised, the nomination may be produced, when the right to use it has emerged, and the positive prescription cannot apply. Suppose the Roxburghe nomination had been upon a simple paper, and had remained unpublished in the Earl's repositories, and was produced when the heirs became extinct who were entitled to succeed before those nominated in this paper, it would have been lawful, even at the distance of a century, to have produced the nomination in proof of the title to take up the estate by that nomination. In the same way here, where the party founds upon the nomination, when the succession opens to him, and where the sixth substitution has been regularly inserted in every investiture of the property, we have no right to hold that the declarator should have long ago been brought to have had that nomination inserted in the investitures. You will observe, that in the deed 1721 there is no provision to be found, declaring, that if the heirs nominated by Alexander Porterfield shall neglect to pursue a declarator to have an irritancy decreed, in case of non-insertion of the nomination in the titles, they shall lose their right to the estate. There is no such provision or declaration in the deed. Nothing of that kind is to be found in it; and though it be admitted that such a declarator might have been brought, yet the neglect of it does not destroy the right to the estate.

The Counsel of Mr Corbet well stated, that it is the same as if an heir called by description in a certain stage of a destination became entitled to the succession at an earlier part of it, in consequence of any circumstances, and neglected to avail himself of the right; could it be held, that by omitting to bring himself nearer the succession, when it was in his power to do so, he would lose his right to the succession altogether?

When a nominee is entitled to take up the succession under the deed, he will be entitled to have his right ascertained, whether he neglected to bring a declarator or not. I never before heard that the act 1617 made the failure to bring such declarator a ground of forfeiture.

May 24, 1826. Therefore, it appears to me, notwithstanding what has been stated on the part of Sir Michael Stewart, that the positive prescription cannot here apply. That it could apply only in the case of Duchal, is confessed: but it has no foundation at all in this case; and I am for remitting to the Macers to proceed in the service of Mr Corbet.

As to Overmains, the case is still clearer, as there is no foundation for saying that by charters of confirmation or precepts of clare constat there was any alteration of the deed 1721. To get a charter in ipsissimis verbis of the original right, can indeed import no alteration of the investiture.

The case of Welsh Maxwell must be held favourable to Mr Corbet's plea, and therefore I need not dwell upon it and the others cited.

As to the superiorities, the situation is different from any of the other properties in this case. Boyd Porterfield, in 1773, obtained a crown charter of these superiorities, reciting the destination of the deed 1742. Infeftment was taken upon it in 1774, and he founded upon these deeds to fortify his claim of enrolment. It is clear that his son Alexander produced them as the foundation of his claim of enrolment as heir-apparent to his father, founding upon them as proving his ancestors to have been infeft in lands of the requisite extent.

It is said this charter must be cut down, because in the Quæquidem clause it is stated, Boyd Porterfield had served heir of line to Alexander Porterfield his grandfather, instead of heir of provision to his uncle William. But the writer of the charter had fallen into a mistake, though he had before him the real title. I am, however, yet to learn, that the erroneous deduction of titles in the Quæquidem clause vitiates a charter as a foundation for the positive prescription, which, in the dispositive clause, is formal and complete, and which, in every essential of the grant, is liable to no exception. I have seen no authority for that. Having been followed by infeftment, and the destination correct in the dispositive clause, it is a valid title. Upon that part of the case no authority is produced to show that such an error in the Quæquidem is a fatal objection. I think the title is unexceptionable; and as to the superiorities, I think Mr Corbet is entitled to be preferred in this competition of brieves.

Lord Glenlee.—It is scarcely decent not to say something in a case of this kind; and, when once one makes a beginning, there is no saying when he will stop.

The first point to be inquired into is, how far the deed 1742 May 24, 1826.
is good for anything.

It appears to me, that the deed 1721, after the fifth substitution, does certainly destine to any other heirs of tailzie that may be named by the granter, by any writing made in liege poustie. There is, also, in the subsequent part of the deed, a power to alter the succession, except as to the first five substitutions, as to the heirs male and female of William, and the heirs-male of the body of the granter. But this gave him no new power; for, from the power to nominate, he might appoint any order of heirs after the first five substitutions. After these first five substitutions, he had the free destination of the entail, and he might name any person he pleased.

Upon due consideration, the title will not appear an onerous one, except as to some of those called in the first substitutions. Strictly speaking, it was only onerous to the heirs of the marriage,—to the heirs of William, but not to any, except in very limited part, of those called substitutes.

Even supposing the title were onerous, it does not appear to me there is sufficient ground for holding that this nomination of heirs should have been expressed in any peculiar style. It was not necessary even to say in the deed of nomination, I appoint A, B, and C, to be heirs after the first five substitutions expire but it was sufficient, if the granter named them to be his heirs: for the very conception of the substitution gave it to them only after these five substitutions. The deed 1721 took care of itself; —these heirs could only take after the first five substitutions.

I do not mean to say, that every deed which the granter should execute, could be held a proper nomination of heirs. There may be cases conceived where there might be room for a very different conclusion. Suppose a minute of sale obliging to grant a disposition to A, B, this could not warrant a claim to come in as heir after the first five substitutions. That would have been a ridiculous plea. It must appear Mr Porterfield meant to exercise the powers he had.

Then it is of no consequence to show an intention to do what he could not do, if it is possible to separate what he could do from what he could not do.

Still more, we are not, because he had not selected the very phraseology that would have occurred to an excellent conveyancer, and had not adopted some elegancies of expression, (for in a certain sense there may be elegancy in conveyancing,) to say the nomination is not valid. Are we to say that it was impossible that Mr Porterfield or his writer should commit any mistakes; and are we therefore to hold that he must have meant

May 24, 1826. something else than to bring in heirs after the fifth substitution, and that he must have meant to destroy the entail 1721? That is unreasonable, if we can make it practicable to bring in heirs as authorised by the entail 1721.

It appears to me also, that it was not necessary that this deed of nomination should be executed on a separate paper, and contain the names of the heirs to come in after the first five substitutions in the entail 1721. The granter might have merely referred to heirs under another entail; and this is nearly the case that has happened. The only difference is, that the heirs to come in under the deed 1721 are mentioned in an entail afterwards made by the granter himself. The nomination is not in a separate paper, but makes one of the clauses of the deed 1742.

Suppose the heirs of these new lands were all separate and distinct persons from those who had been called in the deed 1721, the construction could not have been, that this was meant as a total alteration of the deed 1721, but merely that these heirs should come in the place where the tailzie 1721 authorised: and it was not necessary for Mr Porterfield to express that, but merely to make a nomination of heirs. The tailzie 1721 points out the place where they should come in.

The whole question is reduced to this;—Could the circumstance of mentioning, in the nomination for the sixth substitution, persons having another place in the destination in the deed 1721, render the nomination inept? That may be a superfluity, and a good conveyancer perhaps would not have proceeded in that way. But there is no difficulty in the circumstance of putting after the five substitutions persons called before; and some benefit might be derived to them from that circumstance. It is a great advantage; for if called by the nomination, a person would only have to prove the nomination; whereas, if he is to claim under the first five substitutions, he must trace a lineal descent to show he is one of the number called in that part of the destination. If Boyd Porterfield's legitimacy had been doubted, then he had no occasion to make out his descent through the former substitutions. If he could make it out, then this nomination did him no harm.

It is therefore plain, that as the thing stands, the result is this;—If the deed of nomination, so executed, and the destination in the entail 1721, is put together in one charter, there is an awkward superfluity, but nothing that would not admit of extrication.

The other objection is ill founded. I mean, the idea that any irritancy could be incurred, by engrossing the nomination in a charter. There might have been an irritancy if the nomination

had been put in a wrong place, but not if put in the proper place, May 24, 1826.
first taking those mentioned in the first substitution, and then the others in their order, the heirs nominated coming in under the sixth substitution.

With regard to the objection on the head of non-delivery; it is not a deed which required delivery; and though it did require it, yet, in point of fact, it was out of the repositories of the granter; and Sir Michael Stewart would have to prove that at Mr Porterfield's death it was in his repositories. The legal presumption is delivery.

The whole case, therefore, on Sir Michael's part, depends on the plea of positive prescription; but I do not see termini habiles for prescription. The positive prescription cannot occur except in a competition, where deeds or titles are founded on that are inconsistent with one another. The deed 1721 and the investiture are common to both competitors here; and the question is, which is to have the benefit of them? Sir Michael says, the five first substitutions have failed, and he is now the heir of investiture in the deed 1721. And the other claimant, Mr Corbet, says the five first substitutions have failed; and here is a nomination in terms of the power in the sixth substitution, by which I have now right to the estate.

If you can make out this deed 1742, which connects Mr Corbet with the deed 1721, to be lost by the negative prescription, there might be something in the plea; but there would also be required the positive prescription. During the whole period of possession, those possessing were called both by the five substitutions and this deed of nomination. A remote heir might indeed have brought an action for having the nomination engrossed along with the five substitutions; and no titles might have been made up in consequence of some neglect. Perhaps, then, a good answer might have been made to Mr Corbet. But nothing such has been done. He could not at any time have got anything done that he cannot now; and therefore there is no room for prescription.

In this question of prescription matters stand thus: Here are two persons belonging to different series of heirs, claiming possession of an estate, after certain substitutions are extinct; but the possession has always stood in persons entitled to claim under the deed 1721, and under it connected with the deed 1742. All the irritancies and forfeitures are the same in both titles. It is a settled point of law, that if persons have two titles to their possession, the possession cannot be so applied as to make them prescribe against themselves. If so, where both titles are in fee-simple, why not so in the case of deeds with the

May 24, 1826. same fetters? There might have been some difficulty, if one had been more limited than the other; but where, as here, they are one and the same as to limitation, I cannot see why the same principle should not apply as in fee-simple titles. It is appending the same weight to both. I cannot see any difference.

I do not know if the case was ever decided,—but suppose a man executed a tailzie of his estate, and afterwards makes another tailzie in the same terms, except that, after the first substitution, he makes some change in the order of succession,—suppose it to have been thrown aside, and titles are made up under the first deed of entail, and for a long period the possession goes on under it; and at last the two entails split;—I should have no hesitation in saying there was prescription in favour of the one against the other.

But there is no foundation for the plea of prescription in this case.

I say nothing as to the superiorities. The charter may be bad; but where is Sir Michael's title?

Lord Robertson.—Although I am unwilling to occupy much of your Lordships' time, I cannot explain my views in this case without calling your attention again to those clauses in the deeds 1721 and 1742, upon which my opinion is founded.

Upon the occasion of the marriage of William the eldest son of Alexander, a marriage-contract was entered into, by which the estates of Alexander Porterfield were destined to a series of heirs in succession; 1st, To the heirs-male of the marriage of William with Julian Steel; 2d, to William's heirs-male by any other marriage; 3d, To Alexander's heirs-male; 4th, To the eldest heir-female of the body of the said William Porterfield, and the descendants of the body of the said eldest heir-female; 5th, To the next heir-female successive of the body of the said William Porterfield and the descendants of the body of the said next heir-female successive, all without division; and, 6th, To any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield, by writ under his hand, at any time in his lifetime, in his liege poustie; which last clause has given rise to the present question.

Matters rested on the footing of this entail till 1742, when Alexander executed the other deed now under consideration. During the lifetime of William, and when he might have had heirs-female of his body, Alexander executed this deed, proceeding upon the narrative of the deed 1721. And it is remarkable, that though it proceeds upon a narrative of the limited power

of Alexander to make a substitution in the sixth part of the clause of destination, and his limited power of altering the order of succession, yet it contains an innovation and alteration contrary to such limited powers. May 24, 1826.

In considering the effect to be given to the deed 1742, we must attend to the character and description of the deed 1721. It was not a gratuitous tailzie, executed by Alexander in favour of his son and the series of heirs. It is a deed of tailzie to be strictly viewed, not only because there is a contract of marriage, but because there is a mutual entail in the case; because, in consideration of the marriage, and the provisions made by Alexander, the father of Miss Steel paid a tocher, and executed an entail of his lands upon the heirs of the marriage, first to the heirs-male of the marriage, then to the eldest heir-female of the marriage, and last, to the heirs whatsoever of William Porterfield.

I take it, that Alexander Porterfield was denuded, by the deed 1721, of this estate, reserving his liferent over part of the subjects, and power to make this substitution which I mentioned, and his power of making an alteration of the order of succession; but always without prejudice of the rights of the heirs male or female of the body of William, and the reservation of power to burden the estate for wives and younger children; therefore, I think his power is not to be largely interpreted, as in the case of a gratuitous entail, but to be strictly interpreted, on account of the onerous nature of the deed of entail executed in 1721.

I conceive this is a question of powers. What are the powers reserved to Alexander by the deed 1721, and how were they executed? Although he had reserved a power of altering the order of succession, it was without prejudice of the heirs male and female of the body of William, and to be executed in terms of the reservation.

In judging of the exercise of a faculty of this kind, we must consider the situation of the party exercising the power at the time the deed was executed. Suppose that, the day after the deed of 1721 was executed, a deed similar to that of 1742 had been executed, proceeding upon a narrative of the deed 1721, and that Alexander cut out, not only the heirs-female, but the heirs-male of his son William; can it be doubted, that the deed so executed at that moment, was, not only ultra vires of Alexander, but in fraud of the entail just before executed? and, would it have been an answer to say, though William afterwards lived thirty years, and might have had an heir-female, that because

May 24, 1826. he died without the existence of any such, this deed, which was ultra vires of the granter, and in fraud of the mutual entail and onerous contract, could revive, and receive effect? I cannot enter into the idea of that.

In a question of power, we must consider the power when exercised. When this deed was executed in 1742, William was alive. He survived his father, and therefore, down to Alexander's death, what Alexander had attempted to exercise was a faculty beyond the power reserved in the deed 1721, and contrary to the faith of the contract entered into at that time.

Taking this view of the deed 1742 as an exercise of a reserved power; and being of opinion it was ultra vires of the granter at the time it was executed, it may not be necessary to enter into the other questions, on the supposition that the deed were good.

The question would arise, How far Sir Michael Stewart is secured, in consequence of the positive prescription, or the claim of Mr Corbet cut off by the negative prescription? If it could be shown, that the deed 1742 is a part of the deed 1721, the argument as to the positive prescription could not aid Sir Michael much; for then it might be said, that all the titles made up under the deed 1721 comprehend the deed 1742, and all its provisions. But as I am of opinion that this deed 1742 cannot be considered part of the deed 1721, I see nothing in the way of Sir Michael's title under the deed 1721. For though the exercise of a reserved faculty in terminis of the deed 1721, might be considered part of that deed; yet, if it vary from the reserved power, it cannot be considered a part of the original deed.

Neither can I consider this as of the nature of a conditional substitution, for the heirs-female of William are called in a different place in the destination from that of the deed 1721.

With regard to the title made up in 1773,—the charter proceeds on the service of Boyd Porterfield as heir of line of Alexander, the granter of the deed, which could give him no right to the grant to William; and the making up of an erroneous title cannot be considered as an acknowledgment of the deed 1742, or an interruption of the prescription. The title to the superiorities labours under a great defect; not only the Quæquidem, but the whole of the charter goes for nothing, as proceeding on a service not to the grantee, but the granter.

Lord Craigie.—It appears to me, that we are almost agreed as to the plea of prescription, and that, if the power to nominate heirs in the deed 1721 was duly exercised by the deed 1742, Mr Corbet must be preferred in this competition. It appears to me,

that the power was duly and warrantably exercised, to the effect of calling Mr Corbet to the succession. May 24, 1822.

I am ready to meet Lord Robertson on the question, as occurring with William, the eldest son of the granter, and the heirs of nomination. Suppose it were made out that the deed 1742 was intended to make a new destination; that which was done beyond the powers reserved to Alexander by the deed 1721, would be set aside, and what was within his powers would be valid.

Seeing any error or omission as to the deed 1742 has not affected the rights of any persons under the preceding substitutions; I think the deed of nomination is a sufficient exercise of the power,—I do not so much say of naming heirs, but of giving effect to that substitution in the sixth place of the destination in the deed 1721, under which Mr Corbet now claims the estate. *

The Court therefore, on the 2d July 1817, found, 'That the 'claimant, James Corbet Porterfield, is preferable, and entitled 'to be served heir of tailzie and provision under the brieves pur-'chased by him. Repelled the objections to his title, and dismiss-'ed the brieves of Sir Michael Shaw Stewart, and remitted 'to the Macers to proceed accordingly.'

Against this judgment Sir Michael reclaimed, and James Corbet having died, his son, James Corbet Porterfield, obtained new brieves under the titles that had been claimed on by his father, and avisandum having been made with them to the Court, and answers lodged by him,

Lord Bannatyne observed,—The opinion I have formed in this case, is different from that of the majority of the Court. The parties have gone into a very extensive field of discussion; but it appears to me that the question lies within a very narrow compass.

Alexander Porterfield, by the contract of marriage in 1721, settled his whole property on his son and the heirs-male of the marriage; whom failing, his heirs-male of any other marriage; whom failing, his own heirs-male; whom failing, his son's heirs-female, and their descendants; and after that, he reserves a power to nominate any heirs he may choose, by a deed to be executed by him in liege poustie, then to the heirs-female of his own body, and then to the heirs and assignees whatsoever of William his son. Besides that reserved power to call other heirs, after the heirs-female of his son, he reserved a general power to

* Lord Bannatyne did not deliver his opinion, as he had not heard the pleadings.

May 24, 1826. alter the whole order of succession, except as to the heirs male and female of the body of his son, and the heirs-male of his own body. The estate then stood descendible, (unless he executed such a nomination of heirs,) failing the heirs-female of William's body, to the heirs-female of his own body. Alexander, however, did not allow the matter to stand on that footing. He acquired additional property, and he executed a new deed. He had it in his power, either to make a nomination of heirs to succeed after the heirs-female of his son, or to make a general settlement altering the order of succession after these heirs. But, in place of making a simple nomination of heirs after the heirs-female of his son, he executed a complicated deed, which proceeded on the narrative of both powers, to nominate heirs, and to alter the order of succession. In place of making a simple nomination of heirs, and in place of referring either specially or by general reference to the power, he executed a new settlement, with a declaration, that he meant the old and the new estate to descend to the same series of heirs, and under the same conditions. In fact, it was a new entail of the estate, and it was supposed to qualify the fee in the person of William. I have no doubt of that. The alteration he made went beyond his powers; for, in place of naming heirs, after the heirs-female of William, he brought in the other heirs, in preference to these heirs-female, and William was still alive. The deed thus going beyond his powers, could not operate as a nomination of heirs, because it materially interfered with the right of the female-heirs; therefore, that intention could not qualify the fee in William's person, at the time, and I don't see how it could do so in any other event. My view of the case is this, that this deed being beyond his powers, I cannot see how any after event could make it effectual.

Lord Craigie.—The opinion now delivered, has been confined to one of the many points in this cause, and I have written out notes upon the different points, with which I am willing to furnish the parties; but I don't know if it is necessary for me to advert to the other points. I will do my duty, I think, sufficiently, as the case has been heard most fully, and opinions delivered formerly by your Lordships, if I state my opinion on the point spoken to by my brother.

It appears to me, that the judgment is still well founded, even as to the objection now stated. I must say, in general, as to the execution or fulfilment of the power given by the entail, that the power is one which ought to be construed bona fide, if it was executed in a fair honest manner, to fulfil the stipulations of the marriage-contract. If there were any room for construction,

that is the construction that ought to be applied; and even if there were a looseness in it, it ought to be construed according to the true meaning of the party. But in this case there is no room for construction. Though it is a complicated deed, and not well expressed as to the reserved power, yet it is clearly and decisively a deed, in which we can discover the intention of the maker of it, and that he has used, though not perhaps the best, yet words fully adequate for the purpose. In the first place, it appears to me, on looking into the words of the settlement, that there was this error in the framer of the deed, that instead of prefacing that part of the deed with the reserved power to fill up the substitution, he has given it as a reason in the heart of the settlement. But, according to my interpretation, the meaning of it is the same as if he had said, 'whilks failing, as I have power to nominate 'heirs for filling up that substitution, I call the heirs-male 'of Porterfield of Fullwood, and of Porterfield of Hapland.' That slight transposition would make the meaning of the party clear. As to the excess of power, it appears to me not to be admissible in a case of this kind. I conceive, that where a man does a thing which he has a power to do, and also does a thing which he has not power to do, it is the duty of the Court to separate what he has done beyond his power, from what he has done under proper authority. There is no difficulty as to that here. But there may be a different case, where he blends a power he has, with a power he has not, in such a way that they cannot be separated, the one from the other; in that case they must both be destroyed. But what he has done here confessedly in execution of the power reserved by the entail, he has done in such a way as the Court may give effect to it. If, in this case, Alexander Porterfield, in the deed 1742, had said nothing about the prior substitutions, it would have been perfectly good, because the substitutions in the deed 1742 would have applied to the power, and the rest is mere surplusage. I cannot leave out of view that, at the time and ever after, there were no parties injured by going beyond the power; and further, if there had been any injury, Boyd Porterfield might have objected; but he acquiesced, and appealed to the deed 1742 as an effectual deed. On the whole, in a deed of this kind, in the exercise of a right reserved by a marriage-contract, in a question with heirs, we would do a monstrous injustice, if we were to take hold of irregularities in the deed, in order to destroy what the party really intended to do. May 24, 1826.

Lord Justice Clerk.—Having again considered this case, I am

May 24, 1828. in the situation of my brother who spoke last, that I can see no reason to alter the interlocutor; and, as I delivered my opinion at perhaps too great length, when it was formerly brought before us on full papers, it is not my intention to go over the case again in detail, but I will just state the most prominent parts of my opinion.

I am not moved by the argument on the nature of the power, nor by the argument as to the onerosity of the marriage-contract in 1721, and the unfavourable, nay strict interpretation to be put on the exercise of the power. I am quite clear, that the plea of onerosity is not applicable to anything but the first five substitutions; and as to the rules of construction applicable to such a power, a party divesting himself of his estate, and naming certain substitutes, with a reserved power to make, what I hold to be, the sixth substitution, I know no rule of law, by which to apply a strict construction to such a power. It is argued, as if we were now in a question as to the fetters of an entail; but this is a question inter hæredes, in which a favourable construction is to be applied. But I do not contend for a favourable construction, but only for a fair construction.

I have not been able to alter my opinion, and this was also the opinion of Lord Glenlee, that this is a substitution to be filled up, hæredibus nominandis, the same as where there is a substitution hæredibus nascituris, under which every person who could verify their right under such a substitution, would be entitled to make it good. In the same way, under this sixth substitution, 'to any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield, by writ under his hand at any time in his lifetime in his liege poustie,' all persons who can show legal evidence of their right by a legal instrument in liege poustie, will be entitled to succeed; and the only question is, if there is such legal evidence here, that he availed himself of the reservation.

I am also clear, that there is nothing in the argument as to the nomination being only an alteration of the order of succession. The counsel for Sir Michael places all the force of his argument upon it as an alteration of the order of succession. But I look on it as a nomination of heirs, and as the law does not require it in any precise style, the only question is, the evidence of this being a legal valid instrument. It was executed in liege poustie, for it appears that he lived for half a year after its execution, and it was entered in the public record. If I am right in this, the next question is, Whether it was a valid deed originally at the time it was executed? Though I think it is possible to make out that there were deviations in some of the substitu-

tions, and particularly as to the heirs-female; yet it is material, May 24, 1826.
that there never has been any insinuation that there was any party to avail themselves of the objections on that account; and if there were not, it would be strange if other parties, standing no doubt in connexion with the deed, should be entitled to be heard on these objections. It is the interest of the five first substitutes alone which could be affected. The deed 1742 not only proposes to make an alteration of the order of succession, which was carried into effect as to the 7th and 8th substitutions; but I concur with Lord Craigie in thinking, that when this deed is deliberately considered, in order to discover its true meaning, no doubt can be entertained, that besides the intention of altering the order of succession, there is a purpose of making the new nomination of heirs for the sixth substitution.

But it is said that this deed was not delivered. The answer to this, if indeed it required any answer, is quite satisfactory, that it must be presumed to have been delivered. But delivery was not necessary. The maker had an interest himself in the deed; he had a liferent in part of the lands, and he had a power to alter some of the substitutions. It does not follow, that, if he executed one deed, he was functus. If he executed a deed in liege poustie, it would be effectual. But besides, post tantum temporis delivery must be presumed. It was not the title of the estate; it was the evidence, the proof, the demonstration that the power was exercised.

If I am right in this view of the case, the question that remains is only,—whether in such a situation, where it is not the title, not the investiture on which Mr Corbet claims, but merely the evidence of his being in the right of that substitution, there is ground for the plea of prescription, which was considered formerly a good plea for the baronet, but which has no foundation. Mr Corbet says, 'I found on the deed 1721, on which the whole 'possession has followed ever since, and I only support it colla-'terally, by referring to the deed executed in 1742 in liege pous-'tie.' How it can be said, that because titles have been made up on the deed 1721, these titles can be set up as a title in favour of any other heirs, is incomprehensible to me; for, down to the death of Alexander Porterfield, there was no title but the deed 1721, which is the foundation of Mr Corbet's title:—a great part of the time the estate was held on apparency, but the titles, when made up, were on the deed 1721, with the exception of this, which I cannot consider in the same light with Sir Michael Stewart, the proceedings of Boyd Porterfield in 1773. This is a most material part of the case; for, with regard to this deed, which is said to have been latent, it appears that that person

May 24, 1826. makes the deed 1742 the grounds of his Crown charter, and makes claim on that ground in the court of freeholders; and then Alexander, his son, makes a claim on his right of apparency, and produces the Crown charter. There has been no contrary possession; but we have every evidence that the estate has been enjoyed under this deed 1721, and of which we have evidence by the proceedings in 1773. Has any other title been made up? If a title had been made up after this substitution had come in, there would have been ground for prescription. But, has anything of that kind happened? Nothing of the kind; for the moment that Alexander Porterfield died, when there was room for the sixth substitution, this claim for Mr Corbet was made, and there has been no interference with the title on which this person claims. I am very clear, that it is our duty to find that James Corbet is entitled to be preferred.*

The Court accordingly, on the 22d June 1820, found, 'that 'Mr Corbet Porterfield is entitled to be served heir of tailzie 'and provision under the brieves purchased by him, and remit- 'ted to the Macers to proceed in the services accordingly, and 'to dismiss the brieves at the instance of Sir Michael Shaw 'Stewart, Bart.' As this was only a first judgment in the question with James Corbet, the son, Sir Michael presented another petition; on advising which, with answers—

Lord Robertson, after mentioning generally the nature of the deed of entail in 1721, observed,—This is a contract of marriage—it is a strictly onerous deed, in so far as affects the interests of William, and the descendants of his body; and Alexander could do nothing to affect their interests. But, in 1742 Alexander executed another deed, proceeding on a narrative of the deed 1721; and he thereby altered the order of succession, and brought the sixth substitution into operation. He thereby put the heirs-female of William in a less favourable situation in the order of succession, than they had been in by the deed 1721, and this was clearly ultra vires—the deed 1721 being onerous, he could not affect any one under the tailzie.

Although that alteration might have been challenged by any heir-female of William, as none such existed, a question occurs, how far such challenge can be made by Sir Michael Shaw Stewart, or any other.

When the case was formerly under consideration, I enter-

* Lords Glenlee and Robertson were absent.

tained the opinion that the deed 1742, as ultra vires at the time of execution, could be considered as of no effect, although no such heir-female ever existed. I have altered that opinion. The heirs-female of William, if any such ever had existed, had a jus crediti under the deed 1721, which Alexander could not defeat; but as none such existed to challenge the deed, the deed is perfectly good to the heirs next instituted. The deed 1742 is not absolutely null, in consequence of Alexander having altered the deed 1721, in a way he had no power to make alterations, although such deed would have been null at the instance of an heir-female, if any such had existed. May 24, 1826.

I agree, the deed 1742 must be held as an unum quid. The deed 1742 might be effectual as a nomination, although as an alteration it would not have been effectual. The destination to heirs to be named, as in the sixth clause of the deed 1721, becomes part of the original deed. It is not a reserved power, but is truly a substitution, and it is introduced by the words, 'which 'failing,' &c.

The deed 1742, I think, did not require delivery—it is just a part of the deed 1721.

In considering the question, we must keep in view, that there are not here two different titles, the one limited, and the other unlimited; or two titles, both of which are limited, but where the limitations are different. There has been, in truth, but one title, for the nomination in 1742 is just a part of the deed 1721, the title upon which the possession has all along been held, and upon which both parties must found.

The negative prescription cannot apply; for the very title upon which the estate is now claimed, was the ground of possession of those who had the estate.

Lord Bannatyne.—Although Alexander went beyond the reserved powers that belonged to him, in so far as he made a nomination to the prejudice of the heirs-female who might be born of his son William's body, I think that was only challengeable at the instance of those heirs themselves—and, upon that ground, I now think Mr Corbet's claim is good in law.

Lords Justice-Clerk and Craigie adhered to their opinions; but Lord Glenlee was declined by Sir Michael, in consequence of his second son having married his lordship's daughter.

The Court, therefore, on the 15th of May 1821, adhered to their former judgment.*

Mr Corbet Porterfield then proceeded in that service before

* See 1 Shaw and Ball. No. 6.

May 24, 1826. the Macers, and was served nearest and lawful heir of tailzie and provision in special, in terms of the original tailzie of 1721, and relative deed of nomination of 1742, to Alexander Porterfield, last of Porterfield, in those parts of Duchal holden of the Earl of Glencairn; and to Boyd in the lands of Porterfield and Hapland, that held of the crown, and entered into possession.

Sir Michael Shaw Stewart having died in August 1825, his son, Sir Michael, appealed against the above judgments.

Appellant.—Upon the death of the last Alexander Porterfield without issue, the late Sir Michael Shaw Stewart was, and the appellant now is, the heir of the investiture under which the lands of Duchal have been held since the date of the contract of marriage 1721, and of the personal right by which the Overmains have been held since the death of William Porterfield, in 1752. It is a mere evasion for the respondent to say, that the sixth substitution in the marriage-contract, in favour of the heirs to be nominated by Alexander, the entailer, is an actual substitution, which, upon the nomination taking place, can render the nominees, in the eye of law, the heirs of the original investiture. Such a substitution, when followed by nomination, may confer a right of succession on the nominees, which, if urged in proper time, may be effectual, but it does not render them the heirs of the original investiture itself. They only thereby acquire an obligation against the proper heirs of the investiture. A substitution of heirs to be named, though in form a substitution, is no better than a blank substitution, with a reserved power to fill it up. The investiture itself is not the source of the right of the nominee—for it contains no description of him whatever—it is the deed of nomination that is the source of his right. The respondent, therefore, was not entitled to serve, under the investiture 1721, to Alexander Porterfield, the individual last vest and seised in Duchal, or to William, the person last vest and seised in Overmains; and this view is strengthened by a consideration of the particular circumstances under which the nomination was executed. But the deed 1742 is not a deed of *nomination*—it is a deed of *alteration*; and it is quite clear, that a deed of alteration of a destination cannot render the party in whose favour the alteration has taken place an heir of the altered investiture. The entailer was entitled, under his reserved power, to nominate and to alter. If he nominated, all he had to do was to fill up the sixth substitution. But he could not, under the power to nominate, extinguish the seventh. By the deed 1742, however, the seventh and following substitu-

tions are discharged. He, perhaps, could do so by a deed of alteration; but then the person claiming under the deed of alteration must abandon all title to claim under the deed altered. The rights vested in the heirs of the destination in the marriage-contract 1721 could not be impaired by any deed of Alexander Porterfield, the entailer, and which was not exactly agreeable to the powers reserved by him. But the deed of nomination 1742 was a deed exceeding those reserved powers. The instant that the entail was completed by infeftment in the person of the institute, a vested right was created in favour of the substitutes, which could not be recalled even by the joint act of the disponee and institute, although as to these substitutes the entail were quite gratuitous. This vested right, however, could be affected in two ways, under the two separate reserved powers—either by filling up the sixth substitution, leaving untouched the seventh and following substitution—or by altering the order of succession; and in this also the entailer was limited, because heirs male and female of his son's body, and heirs-male descending of his own body, were excepted from that power. But the period for estimating whether the deed was infra or ultra vires of the disponer, is the period of his death. At that period William was alive, and might have had heirs-female of his body; and yet, by the nomination, parties are called before these heirs-female, whom it was not in the power of the entailer to disappoint. The deed 1742 was therefore clearly challengeable by William's heirs-female, when they existed—it was challengeable by William himself, and by the whole substitutes in the deed 1721, whether called before or after the sixth substitution, containing the power to nominate. The deed is thus null and inoperative; and being so at the death of the granter, it could not be revived and become valid, because, after a lapse of years, the accidental event supervened, that William died without issue-female. The consequence is exactly the same, if the deed 1742 be considered as a deed, not of nomination, but of alteration; for it commences at a period higher than permitted by the contract 1721, and is equally ultra vires. In neither case had the entailer power to call the heirs-male of Fullwood and Hapland before William's heirs-female. This nullity cannot be remedied by compounding the two deeds together, and cutting off the excrescences. It cannot be invalid to some particulars, and valid as to others. It must stand or fall as an integer, or unum quid. Besides, the nullity and inefficiency of the deed has been uniformly assumed and acted on by all parties, as well those against whom as those in whose favour it could be supposed to operate; and the presumption of abandonment has, by

May 24, 1826.

May 24, 1826. acquiescence and taciturnity, been created. Near a century has elapsed from the date of the deed, and now an attempt is made to call it into operation, in face of the conduct of all the parties who have, since its appearance, taken up the property. But, independent of this general presumption of abandonment, it is cut off by positive and negative prescription. Even supposing the currency of the prescription to commence only at the time of the death of the entailer, the lands of Duchal have been possessed under a title in which the appellant is now heir, and under no other destination for more than forty years. His jus crediti as a substitute has been placed beyond the reach of challenge, by the possession and infeftments which have followed and been enjoyed during that period. But, on the other hand, supposing that the deed 1742 gave the nominees a claim to step in to the sixth substitution, (for it could not in that shape create a real burden on the infeftment of William Porterfield, and the other fiars successively taking the estate,) they should have enforced it; but not having done so, that obligation against the substitute in the deed 1721 is extinguished by the negative prescription. The heirs successively possessing, had a clear interest to prefer possessing on the deed 1721, rather than on the deed 1742; and there cannot be a more gratuitous fallacy, than to maintain, that the possession held under the investitures, made up agreeably to the tailzie 1721, was a possession beneficial to the nominees under the deed 1742, and preserving from prescription the rights of the substitutes under that deed. The estate of Duchal was possessed during the years of prescription, not on the deed 1721, in conjunction with the deed 1742, but on the deed 1721 as opposed to the deed 1742. If the rights of the heirs under the nomination are lost in regard to Duchal, they must be equally unavailing as to Overmains.

Respondent.—By the deed of nomination 1742, the entailer's three daughters (through the eldest of whom the respondent claims), and their issue-male, were called to the succession in preference to his heirs-female (through the eldest of whom the appellant claims); and as the prior substitutes have all now failed, the respondent, as heir-male of the entailer's eldest daughter, is entitled to take up the succession in preference to the appellant, the entailer's eldest heir-female. Neither the appellant, nor any other succeeding heir-female, has any right or title to object to the deed 1742. The nomination was quite valid—a conveyance or destination of a landed estate may be made in favour of heirs, or persons to be named by the disponer, with equal competency as one in favour of heirs to be

born of the institute, or of any of the substitutes specially named in the deed. It is an actual substitution, carrying a legal right to the inheritance. It was thus perfectly competent for Alexander Porterfield to name, by reference to the entail of Blacksholm, the heirs who, on failure of the hæredes prædilectæ, he meant should succeed to the estate of Duchal. As to the alleged excess of power, in postponing the heirs-female of William's body, the disponer merely has called in the sixth some of those already called in the fifth substitution. At the worst, it was an oversight of the conveyancer, and a very venial one, since William had no daughters, and no prospect of any family; at all events, the mistake cannot be injurious to the other heirs named in the sixth substitution. The reserved faculty is not one of strict interpretation, as against the entailer, or capable of being executed only forma specificata; on the contrary, it is to be liberally construed—or if it is to receive a strict construction, it is against the heirs under the seventh substitution, who in truth are mere gratuitous donees. It is an entire misstatement to represent the deed 1742 as not a deed of nomination, but of alteration, under the reserved power to alter. No two modes of introducing successors to a tailzied inheritance can be more different, both in their nature and effect. In the one, the feudal grant is made by the original deed; in the other, by the new grant: In the one, the favoured party takes by service; in the other, by declarator and adjudication in implement. In the present instance, it seems impossible to consider the deed 1742 as an exercise of any but a power of nomination. Even if it were an exercise of the power to alter, the deed would carry the estate to the respondent, and affords no ground of challenge to the appellant. It would have been incompetent for any of the hæres prædilectæ to have challenged the deed beyond what was necessary for their own interest, and much more incompetent must it be, for any of the heirs of the postponed substitution to challenge the deed. The plea of nullity, open to the parties postponed, is obviously jus tertii to parties not postponed. The excess is quite easily separated from the due exercise of the power. There are no termini habiles for the operation of the positive or negative prescription; for the title under which the estate was possessed, from the death of the entailer, was not more exclusive of the respondent's right than of the appellant's, but was common to and in favour of both, being the deed 1721, which contained in gremio the destination hæredibus nominandis in the sixth, as well as that to the heirs-female of the body of the entailer in the seventh substitution. It is quite indisputable, that to enable a party to claim

May 24, 1826.

May 24, 1826. the benefit of the statute 1617, possession must have, for forty years, followed on a title which is sua natura inconsistent with, and exclusive of, the right in the deed claimed upon—there must be a diversity of title between the one possessed on, and the one claimed under. But here there is only one title; and as to the negative prescription, there must have been in the party excluded a valentia agere cum effectu. Thus the succession must have opened to him, or the person possessing must have contravened, and nothing have been done for forty years to prosecute the right; but that was not the case in the present instance. Besides, the negative prescription implies, from non-prosecution, an abandonment of a jus crediti. But here, the deed 1742, though an entail of Blacksholm, and creating as to that estate a jus crediti, was, as to Duchal, a mere nomination of heirs, giving nothing to the respondent but a spes successionis, which, whether arising jure sanguinis, or vi provisionis, is never subject to negative prescription.

The House of Lords ordered and adjudged, 'That the said 'cause be remitted back to the Court of Session in Scotland, to 'review generally the interlocutors complained of: And it is 'further ordered, That the Court to which this remit is made 'do require the opinion in writing of the other Judges of the 'Court of Session, on the whole matters and questions of law 'which may arise in this cause, which Judges are so to give 'and communicate the same; and after so reviewing the inter-'locutors complained of, the said Court do and decern in the 'said cause as may be just.'

LORD GIFFORD.—I will now call your Lordships' attention to a case which was discussed at your Lordships' bar a short time ago, in which Sir Michael Porterfield Shaw Stewart, Bart. is appellant, and James Corbet Porterfield, Esq. respondent.

My Lords, it appears that in the year 1721, Alexander Porterfield of Porterfield was infeft and in possession of certain estates, first, the lands known by the name of Duchal, held of the Earl of Glencairn, which formed the most important part of his property; secondly, the lands of Overmains, held of another superior; and thirdly, the superiorities of Porterfield and Hapland, held of the Crown. All these lands had been settled by his contract of marriage with Lady Catherine Boyd, in 1693, upon the heir of the marriage. Mr Alexander Porterfield had a son of the name of William Porterfield, who was his eldest son, and in the year 1721, that gentleman married Julian Steel. Upon that marriage, he settled the above-mentioned estates directly to his son William, and a series of heirs, under the fetters of a strict entail; and by that deed, Mr Alexander Porterfield bound and obliged himself and his heirs, 'duly and validly to in-

'feft and seise the said William Porterfield, his son, and the said Julian May 24, 1806.
'Steel, spouses, and the longest liver of them two, in conjunct fee and
'life-rent, and the heirs-male procreate, or to be procreate, of the mar-
'riage betwixt the said William Porterfield and Julian Steel; whilks fail-
'ing, the heirs-male of the body of William Porterfield, of any other mar-
'riage; whilks failing, the heirs-male of the body of Alexander Porter-
'field; whilks failing, the eldest heir-female of the body of William Por-
'terfield, and the descendants of the body of the said eldest heir-female,
'without division; whilks failing, the next heir-female successivè of the
'body of William Porterfield, and the descendants of the body of the said
'next heirs-female successivè, all without division.' Then comes, 'whilks
'failing, any other heirs of tailzie to be nominated and appointed by Alex-
'ander Porterfield, by write under his hand, at any time during his life-
'time, in his liege poustie; whilks failing, the eldest heirs-female of the
'body of Alexander Porterfield, and the descendants of the body of the
'said eldest heir-female, without division.'

The subsequent part of the deed, contained a power, termed in the law of Scotland a faculty, to Alexander Porterfield, at any time in his life-time, he being in liege poustie, 'to alter, innovate, or change the order,
'course, and succession of the haill heirs of tailzie above specified, except
'the heirs male and female of his son's body, and the heirs-male descend-
'ing of Alexander Porterfield, his own body; and that by write under
'his hand, notwithstanding the present right of fee and infeftments to fol-
'low hereupon, in favour of the said William Porterfield, and the heirs of
'tailzie above-specified, declaring always, likeas it is hereby expressly
'provided and declared, that William Porterfield, and his heirs and suc-
'cessors, should be obliged to take the rights, securities, and infeftments
'of the said haill lands and others above-mentioned, with the burden of
'the irritancies and provisions herein contained, to and in favour of such
'heirs of tailzie as Alexander Porterfield shall so nominate and appoint,
'failing the heirs male and female of William Porterfield his body, and
'the heirs-male of the body of Alexander Porterfield.'

My Lords, some time after the execution of this deed, Alexander Porterfield acquired lands which are called the lands of Blacksholm; and, by a deed executed by him in the year 1742, he tailzied that estate of Blacksholm. I must call your Lordships' attention to the contents of that instrument, because one, and indeed the principal question in this case, turns upon the effect of that deed. By that instrument, Mr Alexander Porterfield, after reciting the contract made upon the marriage of his son with Miss Steel, and the reservations in that settlement, and reciting the power which I have just read to your Lordships, contained in the marriage-settlement, and then reciting his purchase of the lands of Blacksholm, states, that 'being resolved to adject, eik, and add,' &c.—(His Lordship then read the deed, to the part of it where the next heir-female of Boyd Porterfield is called.)

There are then a variety of other substitutions, and it concludes with this limitation,—'whilk all failzeing, the nearest heirs and assignees of
'the said William Porterfield whatsomever, the eldest heir-female always

May 24, 1826. 'excluding all other heirs-portioners, and succeeding without division, he-'ritably and irredeemably.' Then follow the usual clauses and reservations contained in deeds of tailzie.

Alexander Porterfield died on the 14th May 1743, and it appears that soon after his death, the deed which I have last stated to your Lordships, was recorded in the books of Session. It is stated in the Case, that it is not known by whom it was so recorded, but that circumstance is unimportant. I should mention to your Lordships, that Alexander Porterfield had, besides the son William, in whose favour, and in favour of whose issue, the deed was made, a second son, called John. William, the eldest son, died without issue, either male or female, in the year 1752. John, his second brother, had predeceased him, but he died leaving an only son. It appears, that on the death of William Porterfield, he was succeeded by his nephew, Boyd Porterfield, who made up titles to the lands of Duchal, by serving heir of tailzie to his uncle, under the marriage-contract, and taking a precept of clare constat from Lord Glencairn, the superior, but, it is said, without any reference whatever to the nomination of 1742. With regard to the lands of Overmains, Boyd Porterfield completed no title, but continued to possess them on apparency as heir of his uncle, under the investiture completed in the deed of 1721. With respect to the lands of Blacksholm, Boyd Porterfield, instead of making up titles to that estate under the deed of 1742, was, in the year 1757, served heir of line of his grandfather, Alexander; and thus, taking up the procuratory of resignation granted by the seller of the lands to his grandfather, obtained a charter of resignation, and was infeft in the lands of Blacksholm, in fee-simple. He thus incurred an irritancy under the deed of 1742, if that had been an effective deed. With respect to these lands, there is no question in this cause; it is admitted on all hands, that in consequence of the acts of Boyd Porterfield, he had acquired the fee-simple of those lands, freed from the conditions of the tailzie. With regard to the superiorities of Porterfield and Hapland, which, though contained in the marriage-contract, had not been taken up by William Porterfield, the disponee; it is stated that Boyd attempted to make a title in the year 1773, but that the title so attempted was completely erroneous, and that this blundered title is the only one which makes any mention of the nomination of 1742.

My Lords, the view I have taken of this case, which your Lordships will learn presently from the observations I am about to make, will perhaps render it unnecessary for me to trouble your Lordships with any of the specialities as to those lands. For the principal question discussed at your Lordships' bar, depends upon the effect of that instrument of 1742, and certainly also depends on the nature of the titles which have been subsequently made up. Boyd Porterfield died in 1795, leaving a son, Alexander, who completed his titles to the lands of Duchal, as his father had done, by a precept of clare constat from Elizabeth, Countess of Glencairn, in the very same terms as his father had done in 1757, and which was followed by infeftment, both referring exclusively to the marriage-contract of 1721.

Alexander Porterfield died in 1815, without issue, and upon that event, by which the lines of succession in the two deeds of 1721 and 1742 separated, a competition arose betwixt the late Sir Michael Shaw Stewart, the father of the appellant, and the late Mr Corbet, the father of the respondent. Sir Michael Shaw Stewart was the son of Margaret Porterfield, the eldest daughter of Boyd. Mr Corbet was the descendant of Jean, who was the daughter of Alexander Porterfield, the original disponer. Mr Corbet claimed to be served heir under the limitations contained in the deed of 1742. Sir Michael Shaw Stewart claimed to be served under the limitations in the original settlement of 1721; and then the question came before the Court of Session on a competition of brieves, which of these two gentlemen was entitled to be served heir under the then existing investiture of the estate? In that proceeding, the first interlocutor appealed from on the second of June 1817, was to the following effect. (His Lordship then read the interlocutor, preferring Mr Corbet, and stated the subsequent proceedings.) May 24, 1826.

My Lords, the first question in the cause, and which was discussed in the Court below, and at your Lordships' bar, was upon the effect of that instrument of 1742. Your Lordships will have collected that, in the original settlement, after five limitations, terms, or substitutions, was a substitution to any other heirs of tailzie, to be nominated and appointed by Alexander Porterfield by a write under his hand, at any time in his lifetime, in his liege poustie. That substitution followed the limitations to William Porterfield the son, and his wife, and the heirs-male of that marriage; which failing, to the heirs-male of the body of William Porterfield by any other marriage; which failing, to the heirs-male of the body of Alexander Porterfield; which failing, to the eldest heir-female of the body of William Porterfield, and the descendants of the body of the said heir-female, without division; then to the next heir-female successivè of the body of William Porterfield, and her descendants successivè, also without division; then to the heirs of tailzie, to be called as I have stated; so that this power of nomination was subsequent to the limitations to the heirs male and female of William Porterfield. In a subsequent part of that settlement, was contained a power to Alexander Porterfield to alter, innovate, or change the order or course of succession of the whole heirs of tailzie thus specified, except the heirs male and female of his son's body, and the heirs male and female of his own body. Your Lordships will perceive the difference between these two powers: The one was a mere power of nominating heirs to succeed after the heirs male and female of William Porterfield, leaving subsequent substitutions in the settlement to follow and take effect, if they could, after the interposed substitution which had been made by Alexander Porterfield;—the last power in the deed enabled him, without touching the estate limited to the sons and daughters of William Porterfield, to alter the whole order of succession which had been settled in the settlement of 1721.

Your Lordships will recollect, that, in the year 1742, Mr Alexander Porterfield having purchased the lands of Blackeholm, executed a tailzie

May 24, 1826. of them; but, in doing that he recites the power of nomination, and also the power of alteration, and proceeds then to state the limitations to which the estate of Blacksholm was to be settled; and intending that it should go to the same series of heirs, he limits the substitution which he intends to take effect with respect to the estate of Blacksholm. Now, the first question upon the effect of that instrument is, whether it is to be considered with reference to the settled estate, as a deed of nomination of heirs to take under the former deed, or a deed of alteration under the reserved power to alter? If as a mere deed of alteration, then the question is, whether it operates so as to render the nominees heirs of the original destination, or only as an obligation on the proper heir of investiture that they should be added to the succession? In short, whether the party nominated is enabled to serve as an heir of investiture under the original deed, considering the deed of nomination as evidence to show that he is the person to whom the description applies; or whether the deed is to be considered as a deed of alteration. And your Lordships see that this is an extremely important distinction. If it is to be considered as a deed of alteration, then the question arises, whether it was not ultra vires? For your Lordships will perceive, that, in this deed of 1742, he has passed over altogether the heirs-female of William. William had no heirs-female at the time of the alteration; but I apprehend that the validity of this deed must depend upon its being valid or not at the time of its execution; and if it was at that time ultra vires of him to execute this deed, it cannot become valid by a subsequent event, showing that there was no heir-female who could take under the original settlement.

Then, if it were ultra vires, another question would arise, whether it was void altogether, or void only as to the excess; and whether it was challengeable by all the persons named in the subsequent limitations, or was only challengeable by the heirs-female; and as there were no such persons to challenge the validity of that deed, whether it was not good as against all other persons claiming under the original settlement. But still supposing that the respondent is correct in either of these views,—namely, first, in establishing that it was a deed of nomination, or, if it were not a deed of nomination, that it was a deed of alteration, affecting none but the heirs-female,—the appellant contends, that the respondent is barred by prescription; because, for more than forty years, the titles have been made up by the Porterfields without any reference to that deed of alteration or nomination, and without that deed of alteration and nomination ever appearing in the investiture; and therefore the appellant contends, that whatever was the effect of that deed, whether it was a deed of nomination, or a deed altering the tailzie under the power of alteration, still he says that he is entitled to be served heir, because those deeds never appear in any investiture. No reference, as he says, was made to them, except in making up titles to a part. With respect to the other portions of the lands, no reference was made to these deeds, and therefore the respondent is barred by prescription.

Now, my Lords, with respect to the effect of this deed, whether it was

a deed of nomination or a deed of alteration, your Lordships must perceive how important it is that every word contained in the deed should be well weighed. Your Lordships will perceive that certainly it was the object of Alexander Porterfield, at the time he executed that deed, and executed the deed of tailzie of Blacksholm, that those lands of Blacksholm, together with the estate, should go together in one course of succession. He recites the deed of settlement in 1721; and, in reciting that deed of settlement, he recites, as I have already taken the liberty of stating to your Lordships, the power of nomination, and also the power reserved to him of altering and changing the course of succession under the deed; and then he states, 'And being resolved to adject, eik, and add the said 'new-purchased lands to my tailzied estate above-specified, with and under 'the said clauses and provisions mentioned in the foresaid bond of tailzie, 'but with the alteration, change, and innovation of the order and course 'of succession therein contained, and above repeated, in so far as is in-'consistent with the order, course, and succession underwritten, which 'is hereby declared to be the order of succession to my foresaid estates 'and lands, both old and new, with and under the additional clauses and 'provisions after specified; therefore, wit ye me to be bound and obliged 'as by these presents, with and under the express provisions,' so and so. May 24, 1836.

My Lords, if this deed operate as a deed of nomination, your Lordships perceive that all the substitutions of this settlement must be considered as having been introduced, in the sixth place, in the original settlement of 1721. Now, if they are so introduced, your Lordships will perceive, with respect to some of the material limitations, namely, to the heirs-male of William Porterfield, and to the heirs-male of Boyd Porterfield, that they were already provided for in the anterior limitation; but it is said that surplusage will not injure the effect of this; and that he might nominate in the sixth substitution under the original settlement as many heirs of tailzie as he pleased, and that he might do so after the order of succession to which the estate had been previously limited; but still, if interjected between the fifth and seventh limitations of this settlement, the parties bringing themselves within this original settlement of 1721, would be entitled, as heirs nominated by him, to take the succession in that place in the original settlement in which he had a right to introduce them. On the other hand, it is contended, that that could hardly be the intention of the deed of settlement 1742; because, when you look at all the limitations in that settlement, they are completely an innovation on the deed of tailzie. With respect to this estate of Blacksholm, it is admitted on all hands that the order of succession with respect to it, supposing that it had not been affected by prescription, must have been precisely according to the order of limitation in the deed 1742, which contained a complete set of limitations in tailzie of the estate of Blacksholm. In addition, it is said, that supposing William had had female issue, they would not have been affected by this deed of nomination, because they would have taken under the anterior limitation as heirs-female of William.

My Lords, upon this case coming before the Second Division of the

May 24, 1826. Court of Session, the Judges were at first very much divided upon this important question. The majority of them thought that this was to be considered as a deed of nomination. They said, that powers of this sort were to be construed liberally; that although this was not very formally drawn as a deed of provision, yet it appeared to be clearly the intention of Mr Alexander Porterfield that the parties should succeed in the order he had there stated; and that although he had omitted the heirs-female in that limitation, that would not affect this deed as a deed of nomination.

The Lord Justice Clerk, who delivered a very elaborate and able judgment upon this case, when it first came before the Court of Session, was of opinion, that looking at the whole of this instrument, it was to be considered as a deed of nomination; and if as a deed of nomination, the party claiming, according to the limitation therein contained, had a right to make up his titles under the original investiture, because this deed of nomination had merely the effect of showing who was the party who was to succeed; and it was not necessary that it should form part of that investiture, and many cases were put. It was said, that it is considered that if an heir is marked out, the right passes by the law of Scotland to that heir when born; and then when he comes to claim under the investiture, all he has to show is, that he is the person who has been born, and that he is entitled to claim under the original investiture. So it is said here, that when Mr Porterfield comes to claim under the original investiture, he shows his title under the deed containing the substitution hæredibus nominandis; that he produces an instrument by which Alexander Porterfield has nominated him to take in the succession; that that is not an alteration, but that the root and foundation is the original deed; that the deed of nomination shows his character to succeed under the original settlement, and that he is entitled to do so under the original settlement, although the deed of nomination does not form a part of his title, but is merely evidence of his title. When the case came first before him, he says, 'I am 'clearly of opinion that the argument, so far as rested upon the allegation 'that here was an alteration of what was unalterable, is true and well found-'ed, for (he says) though the granter calls Boyd Porterfield as his grand-'son, he takes no notice of him as his heir-male; he says nothing of his own 'heirs-male, and he puts the heirs-male of William behind Jean Porter-'field. These alterations (he says) were ultra vires of the granter of the 'deed in reference to the old estate. But then (he says) admitting the 'fact to be so, it is not pretended, in point of fact, now that there is any 'one in the predicament of being excluded by the alteration. If there 'were, it would be a most obvious and satisfactory statement in his fa-'vour, that under the deed of 1721, which regulates as to the old estate, 'he should be entitled to be preferred against all the world. Any person 'showing himself to be an heir-male of Alexander, or heir-male of Wil-'liam, by that or any other marriage, would be preferred under the deed 'of 1721. Then, he says, although this were an attempt to do what 'could not be done, the deed of 1721 is correct enough, so far as regards 'the interest of any one, claiming as a nominee by it, under the sixth

'substitution in the deed of 1721.' So that I understand the Lord Jus- May 24, 1826.
tice Clerk to state, that in his opinion this was a valid nomination under the deed of 1721. But he says, that even if Alexander Porterfield was to be considered as having exceeded the power given him by the deed of 1721, as there was no one to challenge the excess of that deed, it could not affect the right of Mr Corbet, who claims under the effect of that deed.

Lord Glenlee concurred in the opinion expressed by the Lord Justice Clerk, that this was a deed of nomination; and he concurred with the Lord Justice Clerk in opinion, that if this were a deed of nomination, Mr Corbet was entitled now to serve under the original investiture, and that there was no foundation for the plea of prescription, although there was no delivery of that deed; and was of opinion, that the titles which had been made up, containing that power of nominating, were not inconsistent with Mr Corbet's title; and that, therefore, there were no termini habiles for prescription; for the title made up must be inconsistent with that under which the other party claims. If the title made up is inconsistent with that under which the other party claims, and there was enjoyment under the title for 40 years, then he says prescription would run; but then it is said, that inasmuch as in this case the succession of the estate was according to the original settlement, there is nothing inconsistent. Boyd Porterfield died without issue in 1815; and till then there was nothing to raise the question of prescription.

My Lord Robertson differed from the other Judges, and he delivered a very able opinion, as it appears to me, upon that occasion. He stated the nature of the different instruments, which I will not trouble your Lordships with going over again; and then he said, 'In a question of 'power we must consider the power when exercised;' and in that I must concur, as I took the liberty of stating at the outset, that the validity of a deed is not to be determined by subsequent circumstances, but it must be good or bad at the time it was executed in 1742; and though there was no female issue of William in 1742, and no probability of female issue, it is to be considered the same as if it had been taken exception to the very day after; and although it was said that there was no probability of issue in 1742, I cannot but observe, in that very deed of 1742 there is a limitation to heirs-female of William Porterfield in a subsequent part of the deed. Then Lord Robertson says, 'the question would arise, How far 'Sir Michael Stewart is secured in consequence of the positive prescrip-'tion, or the claim of Mr Corbet cut off by the negative prescription? If 'it could be shown, that the deed of 1742 is a part of the deed of 1721, 'the argument as to the positive prescription could not aid Sir Michael 'much, for then it might be said, that all the titles made up under the 'deed of 1721 comprehend the deed of 1742, and all its provisions. But 'as I am of opinion, that this deed of 1742 cannot be considered as part 'of the deed of 1721, I see nothing in the way of Sir Michael Stewart's 'title under the deed of 1721; for although the exercise of a reserved fa-

May 24, 1826. 'culty in terminis of the deed 1721 might be considered part of that deed, 'yet if it vary from the reserved power, it cannot be considered a part of 'the original deed; neither can I consider this as of the nature of a condi- 'tional substitution, (and this is a circumstance I must call your Lord- 'ships' attention to,) for the heirs-female of William are called in a differ- 'ent place of the deed of nomination, from that in the deed 1721.' My Lord Robertson, therefore, was of opinion, on the whole of his judgment, that this deed of 1742 was to be considered as a deed of alteration, and ultra vires of Alexander Porterfield, and that therefore Mr Corbet Porterfield could not claim under that deed.

My Lord Craigie concurred with the two learned Judges, the Lord Justice Clerk and Lord Glenlee, in his view of the case. His judgment is very short, and I will read it to your Lordships.—(His Lordship then read the opinion.)

On that occasion, Lord Bannatyne gave no opinion, not having heard the argument; but on the case coming on again on the 22d of June 1820, he delivered an opinion, and then he concurred in the view which Lord Robertson had taken.—(His Lordship then read the opinion.)

My Lord Craigie delivered an opinion confirmatory of that which he had given before; and the Lord Justice Clerk did the same. It then came on a third time; and on its thus coming on a third time, both my Lord Robertson and my Lord Bannatyne altered their opinions.—(His Lordship then read these opinions.)

Your Lordships perceive that the result of the opinions of this Division of the Court of Session was, that that deed of 1742 was a good deed of nomination; or that if it exceeded the power which Mr Alexander Porterfield had, it was only challengeable by the heirs-female of William; that none having existed, Mr Corbet was entitled to serve under the original investiture, as having been properly nominated by that deed of 1742.

My Lords, on the question of prescription, it was contended, on the part of Sir Michael Stewart, that even if this was a deed of nomination, still Mr Corbet, claiming under it, was barred by prescription, for the reason I have stated,—that that deed never made its appearance in any of the investitures; and that although there was a reference to the power of substitution, yet it was necessary to show that that power had been acted upon. It was said, that it was a little difficult to contend, that, because in a subsequent title it was narrated that there was in the original settlement a right to nominate, that would save the right of heirs nominated at the time. It was also said, that in order to save their rights, they ought to have appeared in the investitures, made up under the deed of 1721; and it was stated, that in consequence of that investiture not having been made up under the deed 1742, it would have been competent for any of the parties claiming under the deed of 1742, to have compelled the party to make up his title under that deed, and therefore, according to the law of Scotland they were valentes agere cum effectu—and that both

the negative and positive prescription had occurred. On the other hand, May 24, 1826.
it was contended—most powerfully contended, at your Lordships' Bar, (for I may take the liberty of stating, that I certainly never, since I had the honour of a seat in your Lordships' house, and of assisting your Lordships, heard a case argued so luminously and at so much length, as this case, both on the part of the appellant and on the part of the respondent,) it was contended upon the part of the respondent, that the titles made up until the death of Alexander Porterfield in the year 1815, (the last male in that line of succession,) were perfectly consistent as well with the original settlement as the deed 1742; that it was not until that time there was any failure of issue-male of Alexander Porterfield, and that there was no title inconsistent with the claim of the respondent, and therefore it was impossible that prescription could affect it; and that was the opinion of the Court of Session.

My Lords, other points were argued at your Lordships' Bar, of very minor importance, with which I will not trouble your Lordships. I think, even from the imperfect view which I am afraid I have given your Lordships of this case, your Lordships will perceive that the questions involved in this cause are questions, to say the least of them, of extreme nicety and difficulty. Far be it from me to say, that the question upon the effect of that instrument is not a question of very considerable difficulty. If a question similar to this had occurred in England, in the construction of English settlements, and upon the effect of English instruments, I am satisfied that your Lordships would not proceed to a judgment upon this question without calling to your assistance the Judges of the Court below, and having their opinion upon it, and into which it would also be incumbent upon your Lordships' House to examine yourselves. I have felt, since I have had the honour of assisting your Lordships in this House, great regret that in questions of difficulty and nicety occurring on Scotch law, your Lordships, or those having the honour to assist you, have frequently not the advantage of knowing what the opinions of the different Judges of the Court of Session are upon the questions which have been brought here by appeal, and I have felt, and have taken the liberty of so advising your Lordships, that in those cases you should obtain that aid which you endeavour to obtain here by requiring the assistance of English Judges, by calling for the opinions of the other Division of the Court of Session. My Lords, where cases occur in which it does not appear that any point has escaped the attention of the Court below, or that any advantage could be obtained from requesting a further consideration on the part of the Court of Session, I would not advise that that step should be adopted; but when a case of the great importance of the present has received the attention of only one Division of the Court of Session, I have felt (perhaps I may have been in error) that when you are called upon to review opinions of Judges, as the opinions of the Court of Session, your Lordships should possess yourselves most fully of these opinions, and should call for the judgment of the whole Court upon the case; and where that is done, it is desirable to avoid as much as possible prejudicing the opinions of the

May 24, 1836. learned Judges who have not yet had the case before them. If I were now to call upon your Lordships either to affirm or reverse this judgment, I trust your Lordships would believe that I should have discharged my duty without reserve. I should have felt it my duty in that case, not only to have troubled your Lordships with a narrative of the case, (which is almost all I have done on this occasion, except to say that the questions appear to me most important,) but I should have felt, however imperfectly I might discharge that duty, that it was my duty to examine most minutely the effect of the various learned arguments in those papers which were delivered at your Lordships' Bar, many of them extremely difficult points of Scotch law—those particularly with reference to prescription, and to have canvassed the authorities relied on the one side and on the other, as bearing on that question. My Lords, I abstain from doing that now, for the reasons I have given to your Lordships, because if your Lordships concur with me, I think that this is a case in which it would be extremely desirable, not so much from the value of the property, which I understand is at stake in this cause, (because the value of the property is immaterial to your Lordships, if the points are perfectly clear,) but in consequence of my feeling, as I do confidently, that there are points of very great importance, as affecting not only this particular case, but some of them as affecting general questions of Scotch law, and more particularly with reference to the modes of making up titles under such instruments as these, whether they are to be called deeds of alteration or of substitution; and also with respect to the effect of prescription in such a case, on which it would be desirable your Lordships should be fully informed of the opinions of the learned Judges of the Court of Session.

My Lords, under these circumstances I should humbly propose to your Lordships, that this case should be remitted to the Second Division of the Court of Session, for the purpose of enabling them to review the interlocutors which have been complained of; and that your Lordships in sending this case back for that review of the Division of the Court of Session before which it was heard, should direct that they should, upon the points of law which occur in this case, take the opinions of the Judges of the other Division of the Court, in order that if the case should hereafter come up to your Lordships for judgment,—it is not for me to anticipate, or for your Lordships to anticipate, what may be the effect of such a remit,—the judgment which may be pronounced may be satisfactory to the parties, and your Lordships may never hear of the case again; but that if the cause should be brought before your Lordships again on another occasion, your Lordships may have the advantage, which you have not at present, of knowing not only the opinions of the particular Judges who constitute that Division of the Court in which the cause is pending, but that your Lordships may have the benefit, before you decide upon this important and difficult case, of knowing what the respective opinions of the Judges of the other Division are upon this question.

My Lords, when I stated that we should be desirous of receiving the opinions of the Judges of the Court of Session, I meant certainly not to con-

fine myself to the two Divisions, but to include the other learned Judges —the Lord Ordinary for instance, who is called into the Inner House on some occasions. It would be very desirable to have his opinion also upon this occasion, and the more so, because one cannot but perceive, that in a proceeding which has taken place before one of the Lords Ordinary, arising out of the title to this estate, an opinion, as far as can be collected from his interlocutor, has been expressed not coinciding with the opinions expressed in this particular case.* May 24, 1826.

All I should therefore humbly propose to your Lordships upon this particular occasion would be, that this cause be remitted to the Second Division of the Court of Session, for them to review the interlocutors they have pronounced; and with a direction that they will take the opinions in writing of the other Judges upon the whole matter; after which your Lordships will be the better enabled to dispose satisfactorily of the cause.

Appellant's Authorities.—Gordon, Jan. 25, 1771, (15579.)—Ross, March 7, 1765, (Monboddo's Dec. 909.)—Ker, Jan. 23, 1747, (12987.)—M'Neil, Jan. 27, 1826, (4 Shaw and Dunlop, No. 266.) 3 Ersk. 7. 29.—Lookup, Feb. 20, 1754, (1635.)—Wallace, Jan. 9, 1759, (1637.)—Stewart, July 15, 1760, (1638.)—Wemyss, June 13, 1766, (1644.)—M'Dougall, July 10, 1739, (10947.)—Bruce, Dec. 6, 1770, (10805.)—Ayton, July 31, 1756, (10956.)—Maxwell, June 21, 1808, (F. C.)—Sinclair, Dec. 23, 1724, (4123.)—Ogilvies, June 21, 1737, (4125.)—Douglas, July 28, 1737, (Elch. No. 3. Rea. Fac.)—Richardson, July 8, 1760, (4141.)

Respondent's Authorities.—Kennedy, July 13, 1722, (1681.)—Don, Feb. 5, 1713, (15591, and Rob. Ap. Ca. p. 76.)—Lawrie, July 4, 1764, (15613)—Dundas, Jan. 2, 1706, (4068.)—Rennie, July 4, 1712, (4093.)—Maxwell, June 21, 1800, (F. C.)—Lumsden, June 13, 1811, (F. C. affirmed March 14, 1816.)—Reay, 25, Nov. 1823. (2 Shaw and Dunlop, No. 509.)

J. RICHARDSON, MONCRIEFF and WEBSTER, *Solicitors.*

---

* His Lordship, it is believed, referred to a judgment pronounced by Lord Mackenzie, and adhered to by Lord Eldin, in an action by Mr Corbet Porterfield, involving a question as to the effect of his titles, but which was not under appeal.

No. 31. EARL OF STAIR, Appellant.—*Abercromby—Robertson Scott.*

EARL OF STAIR'S TRUSTEES, Respondents.—*Shadwell—Murray—John Miller.*

Trust.—A party having by a trust-deed conveyed his whole funds, interest and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir-at-law and of tailzie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied the trustees from the claim, the *House* of Lords remitted to take the opinion of all the Judges.

May 24, 1826.
1ST DIVISION.
Lord Eldin.

JOHN EARL of STAIR made an entail of his lands of Culquhasen, and others, in Scotland, and thereafter, on the 18th of December 1815, he executed a trust-disposition and deed of settlement in the Scottish form, by which he conveyed his whole estates, real and movable, (excepting those included in the entail,) to trustees, for payment of his debts, and of certain special legacies, and of any other he might afterwards bequeath. There then was the following declaration:—'And after my debts 'and legacies are all paid, and a sum set apart for payment of 'the annuities, or the same are otherwise well secured, I ap- 'point my said trustees and their foresaids to lay out the resi- 'due of the trust funds, and interest and proceeds thereof, in 'purchasing lands in the shires of Wigton or Ayr, or stewart- 'ry of Kirkcudbright, and at the sight and with the advice and 'consent of the Lord President of the Court of Session, and of 'his Majesty's Advocate for Scotland for the time being, to an- 'nex the same to my entailed estate, by taking the rights and 'securities of the lands so to be purchased, to the same heirs of 'tailzie, and under the same conditions, provisions, clauses ir- 'ritant and resolutive, contained in the disposition and tailzie of 'my lands of Culquhasen and others executed by me; and I 'appoint my said trustees and their foresaids to expede charters 'and infeftments thereon in favour of the heirs of tailzie, and 'under the conditions foresaid, and to get the dispositions there- 'of recorded in the register of tailzies; and for the more regu- 'lar management of the said trust, I hereby authorise and em- 'power the said trustees to appoint cashiers and factors under 'them, and to give salaries to each of them, and such gratifica- 'tions to any other persons that may be employed by them in 'relation to the premises, as they shall think fit.' The deed concluded by nominating the trustees to be his executors.

Thereafter, in 1819, he made a will in the English form, by which he bequeathed certain legacies, one of which was not to be payable for six months after his death, and then the deed bore—'And as to all the rest, residue, and remainder of my personal estate in England, which shall not consist of real or government securities, I do direct my executors to convert the same into money, and after payment of my just debts, to invest such money in government securities; and I hereby give and bequeath all such stock, together with all other stocks, funds, and securities of which I may be possessed at the time of my death, to such uses and for such purposes as I have, in and by a certain deed and writing prepared according to the Scotch form, executed by me, and bearing date the 18th day of December, 1815 years, declared of and concerning my personal estate; and as to all estates which at the time of my death shall be vested in me upon my trusts whatsoever, or by way of mortgage, I do hereby give, devise, and bequeath the same unto the trustees there named.' May 24, 1826.

Lord Stair died on the 1st of June 1821, without heirs of his body, and the trustees thereupon took possession in virtue of the trust-deed. His heir-at-law, both in his real and personal estate, was the appellant, John William Henry Earl of Stair, who was also his nearest heir-male of tailzie and of provision, and as such was served and retoured to the lands embraced in the entail.

In November thereafter, (being about five months after the death of the late Earl,) the appellant raised an action, in which, after founding on the trust-deed and relative will, and stating that he had right to the interest of the capital sum left by the late Earl, amounting (after deduction of debts and legacies) to £200,000, from and after the period of his death, he concluded that the trustees should be ordained 'to hold just count and reckoning with the pursuer for the whole interest, dividends, and proceeds of the real and personal estate of the said John Earl of Stair, that has arisen from and since the said 1st day of June last, or that may arise thereon,' and to make payment accordingly. In defence, the trustees maintained, that the claim was, from the nature of the deed, unfounded, and that at all events they had not been guilty of any undue delay. The Lord Ordinary and the Court assoilzied them on the 12th of February 1823;* and this judgment was affirmed by the House of Lords on the 7th of March 1825. In

* See 2 Shaw and Dunlop, No. 187.

May 24, 1826. moving, however, to affirm the judgment, Lord Gifford, after adverting to the equitable rule adopted by the Courts of Equity in England, whereby, at the end of a twelvemonth from a testator's decease, though the land may not have been actually purchased, they will consider the funds for the purposes of the will as invested, so as to give from that date a beneficial interest to those for whom the lands were to be purchased, observed,—'If 'Lord Stair shall be advised to bring another action, raising the 'question as to the period of 12 months, or any other period 'farther than he has already allowed, that is five months after 'the death of the testator, that question will be left *quite un-*'touched by your Lordships' affirmance of this interlocutor. 'The judgment of your Lordships will be applied to the status 'of the cause at that time; and therefore, by affirming this de-'cision, your Lordships will not preclude Lord Stair from rai-'sing any other question.'

Lord Stair accordingly raised an action against the trustees, subsuming 'that the pursuer, as heir of entail aforesaid, is en-'titled to the whole interest, dividends, and profits, arising from 'the said real and personal estate, from and after the 1st of 'June 1822, being twelve months after the death of the said Earl 'of Stair, and in all time thereafter during the life of him the 'said pursuer, until the said real and personal estate be invest-'ed in manner directed by the foresaid trust-disposition;' and concluding, that the defenders should be decerned and ordained 'to hold just compt and reckoning with the pursuer, for the in-'terest, dividends, and proceeds, of the real and personal estate 'of the said John Earl of Stair, that have arisen from and since 'the said 1st day of June 1822, or that may arise hereafter 'thereon, until the said real and personal estate be invested in 'manner aforesaid, and to make payment to the pursuer of the 'balance that may arise on such accounting, or otherwise to 'make payment to the pursuer of the sum of £10,000 annually, 'aye and until the termination of the foresaid trust, and the 'said defender be discharged of their actings and proceedings 'under the same.'

In defence, the trustees stated, that it was Lord Stair's intention, declared clearly and legally, according to the law of Scotland, that his trustees should lay out the residue of the trust-fund, and whatever interest should arise from the trust-fund, while under their management, as an accumulated sum in the purchase of lands; that no charge of mora attached to them, for although £35,000 of the £200,000, being the amount of the fund, was uninvested, yet that had not happened from their ne-

glect, but from the impracticability of procuring an eligible investment in the limited district pointed out by the deceased. May 24, 1826.

The Lord Ordinary, on hearing parties, found, 'That the late Earl of Stair died on the 1st of June 1821, and that the trustees appointed by him, the defenders in the present action, accepted the office of trustees, and took possession of the trust-funds, which at that time amounted to about £200,000 Sterling; that the defenders have stated in their defence, that they have laid out the sum of £145,000 in purchasing lands, as directed by the trust-deed, and that not above £35,000 Sterling remained to be laid out; that the pursuer having raised an action against the trustees, concluding that he had right under the trust-deed to the whole interest, dividends, and proceeds of the real and personal estate left by the Earl of Stair, the testator, since the 1st day of June 1821, with other conclusions unnecessary to be stated, which action having come before Lord Alloway, certain proceedings followed, upon which the First Division of the Court sustained the defence of the trustees, and assoilzied them from the conclusions of the action; that the pursuer having carried the cause by appeal to the House of Lords, the judgment was affirmed; but, at pronouncing judgment, it was stated by one of the Peers, who moved the judgment, that the sentence of the Court of Session was affirmed only in so far as it found that the pursuer is not entitled to the interest, dividends, and proceeds of the estate from and after the death of Lord Stair, reserving entire to the pursuer to claim the said interest, dividends, and proceeds from and after any period after the decease of the said Earl, before which it should reasonably be thought, that the trustees ought to have employed the funds left by him in manner pointed out by the trust-disposition; that no intention is indicated by the settlement of the testator to the effect that the trust-estate was to be enlarged by accumulation; that four years having elapsed since the death of the testator, it is presumable that sufficient time has been allowed for the purchase of land to be entailed according to the direction given by him; and in respect of the delay that has taken place in making these purchases, and that there is no law or equity for subjecting the pursuer to a loss of the whole proceeds and issues of the fund unemployed in consequence of such delay, that it is the duty of the trustees, and that they are bound by law to give a reasonable indemnity to the pursuer, for the loss which he has sustained, and is likely to sustain, by such delay, and therefore

May 24, 1826. 'appointed the pursuer to give in a condescendence of his claim 'against the trustees upon that ground.'

Against this judgment a representation was presented by the trustees, but refused without answers. They then reclaimed by a note, accompanied by the representation; and the Court, on hearing parties, altered the interlocutor, and assoilzied the trustees on the 21st of February 1826, 'in respect that the testator has directed 'that the whole of the produce of the trust-estate, both principal 'and interest accruing thereon, shall be laid out in the purchase of 'land; and that the present is the first attempt made in Scot-'land, for having any part of the trust-estate allotted to the heir 'in the meantime, under such circumstances; and also in re-'spect there has been no undue delay upon the part of the trus-'tees in laying out the trust-funds, as appointed by the truster.'*

Lord Hermand.—There is a very odd finding in the judgment of Lord Eldin, that no intention is indicated by the settlement of the testator to the effect that the trust-estate was to be enlarged by accumulation. I think there is, and that is the most important part of the deed; and as to the intentions towards the heir, these seem to be plain enough. When I look at the bounds within which the purchase was to be made, I rather wonder at the activity of the trustees. Before the heir can complain, I ask him to show where an estate could have been bought. Another thing is as to the presumption of what the testator intended and expected. He could not suppose the purchase could have been made very soon, and I think the trustees have shown themselves most anxious to do their duty.

Lord Balgray.—I am entirely of the same opinion. It is impossible to get the better of the clause founded on by the trustees. The Earl appoints his said trustees, and their foresaids, to lay out the residue of the trust-funds, and interest, and proceeds thereof, in purchasing lands, &c. To apply the English doctrine, would be setting up a principle of equity against the intention of the testator,—that intention is quite clear,—he had given a large estate to this nobleman already; so far it is very different from the case of Sitwell. Besides this, it was through great prudence that he accumulated a large sum of money, and executed a deed in favour of a series of heirs, without intending any particular favour to this nobleman. To be sure, if there were great and culpable delay, or an evident intention to disappoint him, there might be a good ground of complaint; for

* See 4 Shaw and Dunlop, No. 316.

the trustees are bound to do their duty. Some delay would be unavoidable, because they are required to get the consent of the Lord President, the Lord Advocate, &c. I think it is quite impossible to support this judgment. May 24, 1826.

Lord Craigie.—It appears to me that this is a case, in which we should not confine our observations to the circumstances under which it has occurred, because it must be of importance in similar cases. This is the first instance of the kind, and in no similar case of a trust, has the notion now started been entertained. It seems to me, neither consistent with the principles of our law, nor with the opinion of lawyers. The practice of England, and I speak it with all deference, is as opposite to the will of the deceased, in this case, as possible. This claim cannot come into effect at the end of one year from the testator's death. To a certain extent, this would be making a will for the testator. I consider that if, in general, we were to allow a complaint by the heir, he would appear and object to every purchase,—or the trustees might have a partiality for the heir, and favour him at the expense of the substitutes. The purpose of the party here, was to entail the whole funds. Now, if before a purchase was made, some debtor died, how could the intention be made effectual, if the heir were to get the proceeds at the end of twelve months after the testator's death? Or take the case of a man in the East Indies, who makes a settlement of this kind; the time for making a purchase would be half expired before it reached this country. It appears to me, upon the whole, that as this is the first demand of the kind, we must alter the interlocutor.

Lord Gillies.—I entirely concur in what has already been said. I find nothing in the law of Scotland to warrant this claim. I shall always give judgment according to the law of Scotland; but I shall be also willing to adopt any sound views of the law, as delivered in the Court of Chancery. Take the case that Lord Stair had died possessed of no land at all, but a large sum of money to be invested. Keeping in view the circumstances attending this case, I think that even there, no interest would be due to the heir. I am persuaded Lord Stair never thought that his heir was to get a single sixpence, because he had made a sufficient provision for him otherwise.

Lord President.—The intention of the testator here is quite clear, therefore we cannot interpose a principle of equity, except to support that intention. The analogy stated is quite the reverse. In every act now passed relative to entails, there is a clause, importing that the heir shall not draw the interest of the fund till the money is again invested in land by a purchase be-

May 24, 1826. ing made, and for this reason, because it is more for the interest of the heir to get the rents of land.

Lord Stair appealed.

Appellant.—The late Earl merely meant, that whatever interest was due at the period immediately after the debts, legacies, and annuities were paid and provided for, (and when consequently the amount of the fund became known,) was, along with the principal, to be invested in land. His Lordship did not contemplate any farther accumulation of interest—nor can such intention be inferred from the trust-deed. The trustees had no right to delay beyond that period, because, quod pure debetur presenti die debetur. The appellant is, therefore, entitled to claim the annual interest of the funds, as a surrogatum for the rents of the lands which he would have enjoyed, had the testator's instructions been duly carried into effect. It is not necessary that the appellant should instruct blame on the part of the trustees. It is enough, if there has been delay. If that delay arose from prudential motives, the posterior heirs are not to be benefitted at the expense of the present heir. He is as much entitled to be favoured as any other who is to succeed to him. In point of equity, the whole fund should be regarded as invested in land, and the interest as the rents due to the appellant. The principle of this claim is in perfect accordance with the rules of equity that govern the practice of the Scotch Court, and the very question has in England been decided in favour of the heir making the claim. If the latitude insisted for by the trustees were granted, there would be no limit to delay.

Respondents.—The plain and obvious intention of the late Earl was, that the interest and proceeds equally, as well as the principal sum itself, should form part of the trust-estate, and as such be employed in the purchase of lands, for behoof of the heir of entail. His object was not to favour any particular individual, but that an extensive landed estate should be acquired to, and enjoyed by, those who represented him in his titles and dignities. Therefore, the appellant cannot say that any special favour for him can be gathered from the deed of the late Earl, and which distinguishes this case from others, where a trust is made for behoof of a particular person, on a recital of love and favour; and, consequently, he cannot maintain, that it was the intention of the late Earl that he should enjoy the proceeds of the funds until they were vested in lands. He was to have no right to the proceeds prior to their being so vested, and it was rents, and not

interest of money, which he could demand. Neither has he any claim, because there has been some time lost in getting the funds laid out on land. He enjoys an ample provision of £17,000 a-year under the deed of entail, and therefore, he cannot complain of hardship. No doubt, if the respondents had been guilty of undue and improper delay in accomplishing the purposes of the trust, with the view to injure the appellant, he might have had a claim. But no such thing can be suspected. On the contrary, considering that the respondents are limited in making their purchases within a particular district of no great extent, they have been most active in the performance of their duty. The claim is unsupported by any authority in the law of Scotland, and is contrary to the practice there followed, and the understanding of practical men. May 24, 1826.

The House of Lords ordered, 'that the said cause be remitted 'to the Court of Session in Scotland, to review generally the 'interlocutor complained of; and it is farther ordered, that the 'Court to which this remit is made, do require the opinion in 'writing of the other Judges of the Court of Session, on the 'whole matters and questions of law which may arise in this 'cause, which Judges are so to give and communicate the same; 'and after so reviewing the interlocutor complained of, the said 'Court do and decern in the said cause as may be just.'

LORD GIFFORD.—My Lords, I rise, not for the purpose of moving your Lordships to give judgment at the present moment, but to correct a misapprehension which appears to have existed in Scotland as to the import of the decision of this House, on what fell from myself, in calling your Lordships' attention, on the former occasion, to the question then before you. It seems to have been supposed that this House was anxious to engraft upon the law of Scotland that which was the law of England, as applied to cases of this description. My Lords, speaking of myself, I can state, that it was very far from my intention to convey any such idea to the Courts of Scotland. It was then stated, that if Lord Stair should be advised to bring another action in the Courts of Scotland, to endeavour to obtain the interest on this fund before it was laid out, a question of great importance would arise, and a question which, it was admitted, would, for the first time, be brought to decision before the Court of Session. Upon that occasion an English case was referred to, and in calling your Lordships' attention to that case, I took the liberty of observing, that whenever this question should be brought before the Courts of Scotland, I thought it would require very grave consideration on their part, whether they might not feel it necessary to adopt some rule—not saying the rule adopted in England, —but some rule as applied to all cases, as a rule had been applied in the law of England, and not leaning to the circumstances of each particular

May 24, 1826. case, to have it determined, whether, in that particular case, the person entitled to the enjoyment of the fund, should be entitled to the interest and proceeds of the fund till it was laid out. That was what was intended to be conveyed to your Lordships, when that former judgment was pronounced; but it was far from the intention of any noble Lord in this House, to throw out, that they were to look at the law of England as the law by which they should be governed. But in referring to the rule adopted in the law of England, I referred to it by way of illustration, not suggesting that a principle should be adopted, because it was a principle of the law of England; but that it should be adopted, if at all, on principles of convenience—not myself applying such a rule, but leaving the case quite untouched.

My Lords, this being the first case in the Courts of Scotland, and likely, therefore, to establish a precedent for future cases, I very much regret that that course has not been pursued in this case, by which the concurrent opinion of the Judges in the Court of Session could have been taken upon the subject before your Lordships were called upon to decide upon it. I regret this the more particularly, when I find that the First Division of the Court of Session differed from the very learned Lord Ordinary Lord Eldin. However, it appears that course was not pursued, and it is for your Lordships to consider, in the first place, whether the decision of the First Division is right or not. If it be right, your Lordships will only have to affirm; but if your Lordships should not concur in the decision at which the First Division of the Court of Session have arrived, it will be for your Lordships' consideration, what course it will, under such circumstances, be proper to adopt.

My Lords, I have thought it my duty to state so much at the present moment, that the impression which appears to have existed in Scotland, might no longer remain, namely, that there is any anxiety on the part of any member of this House, to introduce into Scotland the law of England. Speaking for myself individually, I can say, that whenever Scotch cases have been discussed before your Lordships, in which I have assisted, I have been most anxious, (whether I have succeeded, it is not for me to say,) to decide those cases upon the principles of the law of Scotland, divesting myself, as far as possible, of all prejudices and feelings which I might have imbibed from having been educated in the law of England. That was my purpose on the present occasion, and I must have been very much misunderstood, if I was supposed, when this case was before your Lordships' House on a former occasion, to have intimated any desire, that the Courts of Scotland should adopt the law of England. I left that question quite untouched, and stated that it was most desirable that the case should be considered and decided in the Courts of Scotland on the principles of the Scotch law—that if the case should be again brought before your Lordships by appeal, you might consider how far the principles of Scotch law, and of Scotch law alone, justified or not that decision. For the present, I have only taken the liberty of making this statement, for the purpose of preventing any such impression in the minds

of the learned Judges of Scotland being longer retained; and I will now close, by moving your Lordships to adjourn the further consideration of this case to a future day. May 24, 1826.

LORD GIFFORD.—My Lords, there is a case of very great importance which has been heard at your Lordships' bar, in which the Earl of Stair was the appellant, and Sir John Dalrymple Hamilton M'Gill of Cowsland, Bart. and others, trustees of the late Earl of Stair, were the respondents. The question that arises in this case, is a claim made by Lord Stair to the interest and proceeds of certain funds which were disponed by the late Earl of Stair, to trustees, in an instrument called a trust-disposition, made by his Lordship in the year 1815, and by which settlement he gave and disponed to the respondents all and sundry lands and heritages, &c.

Then by his will, which is an English will, executed in the year 1819, he gave all his stock in government securities, together with all other stocks and securities of which he might be possessed at the time of his death, to such uses and to such purposes, as he had by this deed of 1815 declared of and concerning his personal estate. The effect of this was to increase his settled estate. He died on the first of June 1821, without leaving any heirs of his body; and the present appellant, John William Henry, Earl of Stair, who is the nearest heir-at-law to the late Earl of Stair, is the person who is now entitled to the possession of the tailzied estate, and of course entitled to the rents of the estates which were to be purchased by those trust-funds.

The appellant, within a few months after the death of Lord Stair, raised an action in the Court of Session against the trustees, contending that he was entitled to the interest of the trust-fund from the time of my Lord Stair's death. The judgment of the Court of Session was against him on that occasion. That case was brought before your Lordships by appeal; and, my Lords, it was contended in that case, upon the principle of several English decisions in the Court of Chancery, particularly a case decided by the present Lord Chancellor, of Sitwell *v.* Bernard, reported in the 6th volume of Vesey Junior's Reports, that the object of my Lord Stair being to increase the tailzied estate, the present appellant ought, before the property was invested in land, to have the interest of the money, because otherwise his enjoyment of it might be postponed to an indefinite period, and he might never enjoy any benefit from that trust at all. The English Courts under similar trusts have decided that in order to do justice between the tenant for life, (the heir of tailzie in Scotland being, as far as enjoyment goes, the same individual,)—that in order to do justice between the person who is first to take, and those who are to follow in the succession, (unless there is an express trust declared by the testator that the interest shall accumulate until it is laid out,) some reasonable period should be given after the death of the party, or after the commencement of the trust, at the termination of which it shall be considered, that if the property be not invested, it shall be held as invested; that,

May 24, 1828. therefore, the tenant for life shall enjoy the benefit of it from that period; and, by analogy to the rule which prevails in the payment of legacies, where no time is specified, the Courts have held that at the end of one year the party shall be entitled to the interest.

Proceeding on the principle of that case, Lord Stair instituted his original action; but he did not follow up the analogy from the law of England, for he claimed the interest and produce within five months after the late Earl of Stair's death. Upon that case coming by appeal before your Lordships, your Lordships sustained the judgment of the Court below, being of opinion, that supposing the Earl of Stair was entitled to interest, still he applied too soon; that the principle of the English law being to allow a reasonable time for the execution of the trust, Lord Stair was at all events too soon in bringing his action; and my Lords, in delivering judgment upon that occasion, I adverted to the case of Sitwell v. Bernard, and other cases, stating, or at least intending to state, that they were no further applicable to a Scotch case, than as they proceeded upon general principles, and not upon principles extracted particularly from the English law upon the subject. When that case was determined, (which I think was the first case in which it was determined, that the plaintiff was entitled to interest from the period of a twelvemonth after the testator's death,) it was felt that if each case were to be determined on its particular circumstances—if the Court were to say in one case, if you delay eighteen months, that is improper; and in another case, if you delay two years, that is not proper—that uncertainty would be attended with the greatest inconvenience; and an expression was used by one of the learned Judges, in one of the cases, that it would be better to cut the knot, and to lay down an equitable rule, as between the person entitled to immediate succession to the estate and the parties to take the succession after him. Under these views, I intimated that I thought it would be highly desirable, that the Scotch Courts should consider, whether or not they could, consistently with the Scotch law, adopt any general rule, not laying down twelvemonths as the extent, or any precise or definite period, within which this trust should be considered as executed in favour of the party interested, but at the same time taking care not to prejudice those coming after him. I have referred to this, because an expression fell in the course of the argument, at your Lordships' bar, which I took the liberty of correcting, that it was considered, that what had passed in your Lordships' House upon the former occasion, seemed to imply an opinion, that the Court of Session were bound to adopt the English rule, than which nothing was further from the intention of the individual having the honour of addressing your Lordships; and I perceive, from the notes which were taken of what passed upon that occasion, that I expressly stated, 'that is a question which deserves the consideration of the Court below, whenever it is properly raised; but in this 'case, looking to the form of the summons, which looks to the death of the 'testator, and the action brought at a period which no principle established 'by the English cases can justify, your Lordships cannot, I think, in this 'case, be called upon to decide that case hypothetically. If the question

'arises in this or any similar case, it is most fitting that it should receive all 'the consideration it can receive in the Courts of Scotland, which may, for 'reasons that I may not be at present aware of, think that though it may be 'convenient to lay down a general rule, the rule laid down in the English 'Courts cannot apply. I think therefore that your Lordships, by affirming 'the decision of the Court of Session, will not preclude Lord Stair from rai- 'sing that question, which I will not now enter into, not knowing whether 'the trustees have yet laid out the whole of this residue or not. If Lord 'Stair shall be advised to bring another action, raising the question as to 'the period of twelve months, or any other period farther than he has 'already made, that is five months after the death of the testator, that 'question will be left quite untouched by your Lordships' affirmance of 'this interlocutor.'

May 24, 1826.

Your Lordships were asked upon that occasion, to do that which I felt it quite impossible to do, that if your Lordships should be of the opinion, as you were, that the judgment below should be affirmed, you should declare, prospectively, from what period Lord Stair should be entitled to the interest. I stated that, considering that was a question which ought to be discussed in the first instance in the Scotch Courts, and to receive the decisions of the Scotch Courts, I thought that your Lordships ought not to be called upon, at that time, to pronounce any decision upon that question, particularly where it was admitted on all hands, that it would be a new decision in the law of Scotland.

My Lords, subsequently to that decision, another action was raised by Lord Stair, concluding to have it found that he was entitled to the interest and proceeds from the 1st of June 1822, being twelve months after the death of the late Lord Stair. My Lords, this case came before a very learned Judge as Lord Ordinary, Lord Eldin; it was discussed before him, and it was contended that the general principles of the English Courts did not extend to cases in the Courts of Scotland, and that, in the Scotch Courts, no such decision had ever taken place. My Lord Eldin, on the 7th of July last, pronounced this interlocutor, (his Lordship then read it.) After that a representation against this interlocutor was presented to the Lord Ordinary by the respondents, but his Lordship, without ordaining the appellant to lodge answers, pronounced another interlocutor, on the 12th of November 1825, refusing the desire of the representation, and adhering to his former decision.

My Lords, the respondents then presented a note to the Lords of the First Division, praying their Lordships to alter the Lord Ordinary's interlocutors, and their Lordships having resumed the consideration of this note, they differed from Lord Eldin, and they pronounced an interlocutor, on the 21st February 1826. (His Lordship here read the interlocutor.)

The Judges, in delivering their opinions, some of them at least, seem to have considered that this case was attempted to be supported entirely on English law.

My Lords, I am sure that the Court of Session must have very much misunderstood the observation, or the natural conclusion from any obser-

May 24, 1826. vation I ever made in a Scotch case, if they suppose that it was ever my wish to advise your Lordships to adopt a rule, as applicable to a Scotch case, because it had been laid down and applied to an English case. My Lords, in the hearing of the case of my Lord Stair before your Lordships' House, the case of Sitwell *v.* Bernard, and Campbell *v.* Monsie, and others, were unquestionably mentioned. In the former action, the Scotch lawyers argued,—but they argued without success, and rightly without success in that case,—that as in England the Courts had in a very recent period held it desirable to lay down a rule to govern all cases where no general rule existed, that the Courts of Scotland ought to adopt a similar rule to the English Courts. The rule, whether right or wrong in England, is not drawn from English law, but is supposed to be founded on principles of general equity, applying to such cases; and, therefore, I regret extremely to see any feeling upon the part of the learned Judges of the Court of Session, arising from the idea that there was any attempt, by anything which passed upon the former occasion in your Lordships' House, to impose on the Court of Session a rule which had been adopted in the Courts of England. I think that would be a most improper attempt. If the Courts of Scotland cannot consistently with their rules adopt such a rule, or if they think that it would be inconvenient to adopt such a rule, or that it is not necessary, on their general principles of law, to adopt such a rule, I do not mean to say, that the decision of the Courts of Scotland, so finding, would be to be found fault with. But, on the other hand, it is to be recollected, that this is the first time this question has ever been litigated in the Court of Scotland. I do not find any of the Judges say that there is any series of decisions which has settled this question. They seem to consider it as the first case of the kind which has occurred there. I regret, therefore, particularly when I find Lord Eldin, the Lord Ordinary, of opinion, 'that there is no law nor equity for subjecting the 'pursuer to a loss of the whole proceeds and issues of the fund unem-'ployed, in consequence of such delay;' that it should have been conceived that by the expression of a wish, that it might be considered whether some rule would not be convenient, there was a desire to impose upon the Courts of Scotland that which was the rule in the English Courts. My Lords, see what the effect is, if there be not some such rule. Suppose, instead of the trustees having laid out the money they have done in land, that they had, without any improper delay on their part, said that they had not found opportunities of purchasing land during the life of Lord Stair. According to this decision, Lord Stair could not receive a farthing of interest during his whole life, though he was the favourite person pointed out specifically by the late Lord Stair, as the person to succeed to the tailzied estate, and it was clear that it was intended he should derive a benefit from this property.

My Lords, it was said in the argument in the Court below, and was argued at your Lordships' bar, that the only medium on which the Earl was to receive an interest from the fund, was in the shape of land; and that until it was laid out in land, at whatever time, he could derive no

benefit from it. I took the liberty of putting a question to the learned counsel, who argued this case very ably, whether he pushed his doctrine to this extent, that until it was laid out in land, at whatever time, he could derive no interest; because, if so, in case of an improper delay, did he mean to say that Lord Stair could not then proceed against the trustees? I do not mean against them personally for damages, but could he not claim, in the Court of Session, a right to the income from the property that was not invested? Lord Eldin's interlocutor shows his opinion to be, that if there has been an improper or unreasonable delay, or if a reasonable time has elapsed, even without any improper conduct on the part of the trustees, in the way in which it might be fairly expected property might be fairly laid out, it is the duty of the trustees, and that they are bound in law, to give a reasonable indemnity; because, if it were not so, Lord Stair might in such circumstances be deprived, during his whole life, of the opportunity of touching one sixpence, and it may happen that the party has no other provision. It is said, that, in this case, he has another provision; but the argument would go to the extent, that even if he had no other provision, still he could not touch this property till it was laid out in land. May 24, 1826.

My Lord, I took the liberty of stating at the close of the argument, that I regretted extremely the feeling on the part of the Court of Session, and as it is a question quite new, and depending upon general principles, and upon principles which affect a great variety of cases, I would take the liberty of stating, that I regret they have not done that which they have very often done in other cases with great advantage, namely, taken the opinion of the other Division of the Court of Session; because, I am sure that it would be far from your Lordships' wish to do that which has been supposed, namely, to force that upon the Court of Session which you think right in the English Courts; and that is not the effect of any judgment which has been pronounced while I have had the honour of assisting your Lordships. The only question is, whether, being a case quite new,—untouched by any decision,—Lord Stair, the appellant, has any equity against these trustees, to receive from them any part of the income of this property till it is laid out in land. I think I might venture to ask the Lords of the Court of Session, to what period they would say this property is to be tied up in the hands of the trustees? If they say, that, looking to the interest which the present Lord Stair was to enjoy in the fund, and looking also to the interest of those to come after him, it was the clear intention of the late Lord Stair that this fund should be invested with due expedition in land; then I would ask if it could not be so invested, was it his intention to withdraw from the present Lord Stair altogether the interest of that fund? If that was not his intention, the result would seem to be, that it would be unjust or inequitable to deprive Lord Stair for an unreasonable time of the benefit of it.

Upon the whole, my Lords, I would take the liberty of suggesting,—not meaning to impugn the decision of the Court of Session, but, as I threw out when the case was argued at your Lordships' bar, being a decision not affecting this particular trust merely, but other trusts in Scot-

May 24, 1826. land,—that this case should undergo further consideration in the Division of the Court in Scotland in which the case was heard, and that their Lordships should take the opinion of the other Division of the Court upon the subject. It may be, as I have stated to your Lordships, that the other Division may concur with the learned Judges who have given their opinion, or it may be that they may not. Considering the importance of the general question raised in this case, and considering how materially it affects trusts in general, as well as the value here in question, (not that I should ever think of remitting a case because it involved a question of value, if it were not a question of difficulty,) the best advice I can offer your Lordships, is to remit this case to the First Division of the Court of Session, that they may review the interlocutor they have pronounced, with a direction to them to take the opinion of the other Division on it; and that will have this good effect, that at all events the question having been reviewed, it will be now fixed at least one way or other. If it should come before your Lordships to decide, whether the rule laid down in Scotland is a bad rule, or not, your Lordships will have the advantage by the remit, of establishing, with the concurrence of both Divisions of the Court, some rule or other applicable to all cases, or the Judges will state to your Lordships, that each case must depend upon its peculiar circumstances; and I do not mean at the present moment to state, that they will not say rightly that each case must depend upon its particular circumstances. The former judgment of your Lordships declared, that the Earl of Stair was not entitled to the interest, dividends, and proceeds, from any period, after the decease of the late Earl, before which it could reasonably be thought that the trustees ought to have laid out the funds,—which are the very words which occur in English cases upon the subject; and certainly Lord Eldin was of opinion, that it was not the intention to tie up the proceeds indefinitely, but that the interest and proceeds should be paid to the Earl of Stair, until the property could be fairly laid out in land,—the question being left quite open, whether that time was one year or two years, or whether it was in the discretion of the trustees to be regulated by circumstances. My Lords, with a view to have this important question set at rest, and with a view to guard myself from being supposed to lay down such a rule as that which has been supposed, I would take the liberty of proposing, as your Lordships' judgment, that which I have stated to your Lordships.

Appellant's Authorities.—Campbell, 6th June, 1752 (7440 and 14703)—Sitwell *v.* Bernard, 27th July and 5th Dec. 1801. (6 Vesey, jun. v. 6. p. 520.)

RICHARDSON and CONNELL—GOODEVE and RANKEN, Solicitors.

ARCH. CRAUFURD, W. S. Appellant.—*Shadwell—Keay.*

Mrs TORRANCE and HUSBAND, Respondents.—*Adam—Buchanan.*

No. 32.

Stat. 10 *Geo. III. c.* 51.—*Entail.—Expenses.*—Held (reversing the judgment of the Court of Session), 1. That the accounts of expenditure by an heir of entail, under the above statute, must specify the particulars, and not state merely the sum total expended. 2. That the vouchers or receipts must be granted by the party performing the operations, and not by tenants who have been authorised to get them done, or had right to them by their leases. 3. That a notice given in 1810, and operations performed under it in that year, and thereafter in 1816, and when intervening notices as to other parts of the estate had been made, was not sufficient to authorise improvements in 1816; and, 4. That it is incompetent to award expenses in an action of declarator, under the above statute.

May 26, 1826.

1st DIVISION. Lord Alloway.

BY the statute 10 Geo. III. c. 51, it is enacted, 'that every 'proprietor of an entailed estate, who lays out money in en- 'closing, planting, or draining, or in erecting farm-houses and 'offices, or out-buildings for the same, for the improvement of 'his lands and heritages, shall be a creditor to the succeeding 'heirs of entail for three-fourth parts of the money laid out in 'making the said improvements.' But it is 'provided always 'that every proprietor of an entailed estate, when he intends to 'lay out money on such improvements, shall, three months at 'least before he begins to execute the same, give notice in wri- 'ting to the heir of entail next entitled to succeed to the said 'estate, after the heir of the body of the said proprietor, if with- 'in Great Britain or Ireland, of such his intention, specifying in 'such notice the kind of improvement intended, and the farms 'or parts of the estate upon which improvements are intended 'to be made, and shall lodge a copy thereof with the Sheriff or 'Steward-clerk of the county wherein the lands lie,' and 'shall 'annually, during the making such improvements, within the 'space of four months after the term of Martinmas, lodge with 'the Sheriff or Steward-clerk of the county within which the 'lands and heritages improved are situated, an account of the 'money expended by him in such improvements, during twelve 'months preceding the term of Martinmas, subscribed by him, 'with the vouchers by which the account is to be supported 'when payment shall be demanded or sued for.'

Mrs M'Mikin Torrance, the substitute heir of entail in possession of the entailed estates of Kilsaintninien and Grange, in the county of Ayr, together with her husband, in virtue of the above statute gave to Archibald Craufurd, W. S., the next heir of

May 26, 1826. entail, several notices between the years 1810 and 1817, of their intention to make improvements on the estates.

In particular, *first*, Mrs Torrance, on the 12th June 1810, with consent of her husband, intimated to Mr Craufuird, that she 'was 'to make the following additions and improvements on the farm 'aftermentioned, part of the said entailed estates, viz. On the 'farm of Laigh Grange, that she was to build and erect a new 'dwelling-house on said farm, the present one being old, incon-'venient, and in bad condition. On the farm of High Grange, 'that she intends to build some additional houses for the ac-'commodation of the farm, and particularly some houses at a 'place called Slateford. On the farm of Milton, that she in-'tends immediately to make some additional improvements 'on the houses and offices of Milton; particularly to build and 'finish a new barn, and which improvements and buildings she 'intends to begin as soon as possible.' Of this, a copy was lodged with the Sheriff-clerk, in terms of the statute.

Under this intimation, there were expended, between Martinmas 1809 and Martinmas 1810, on Laigh Grange, which was possessed by John M'Lymont, £424, 10s.; on Milton, possessed by Robert Allan, £120, 13s.; and on High Grange, possessed by Peter Galt, £77, 14s.; making altogether £622, 18s.

The account relative to this expenditure, which was recorded in the Sheriff-court books, was in these terms:—'An 'account of the sums of money paid for building houses on the 'following farms on the estate of Grange, the property of Mr 'and Mrs M'Mikin Torrance, lying in the parish of Maybole, 'and sheriffdom of Ayr, between the term of Martinmas 1809 'and the term of Martinmas 1810:—

'On the farm of Laigh Grange, possessed by John M'Lymont—					
'For building a barn, per receipt, -				£159	19 0
'For building a byre, milk-house, and stables, per receipt, ...				263	0 0
'On the farm of Milton, possessed by Robert Allan—					
'For building a barn, as per Robert Allan's receipt, ...	£103	17	7		
'For repairs on a milk-house, as per Robert Allan's receipt, . .	8	8	0		
'For paving the kitchen floor, as per Robert Allan's receipt, .	8	8	0		
				120	13 7

'On the farm of High Grange, possessed by Peter Galt— May 26, 1826.

'For building a wright's shop, a smith's shop, 'and dwelling-house at Slateford, on the farm of 'High Grange, ... 77 14 0

'£622 18 0'

The vouchers consisted of receipts from each of the tenants, and of which the following, granted by M'Lymont, is an example:—'January 19, 1811.—I hereby acknowledge that I have 'this day received from Mr and Mrs M'Mikin Torrance £159, '10s. for building a barn; also the farther sum of £265 for 'building a byre, milk-house, and stables, all on the farm of 'Laigh Grange, amounting in all to £424, 10s. Sterling, which 'barn, milk-house, byre, and stable, were built between the 'term of Martinmas 1809 and the term of Martinmas 1810, 'and the same is hereby discharged. (Signed) John M'- 'Lymont.' In the receipt by Galt, he stated that he had received the money 'agreeably to a clause in my lease.'

Under the same notice, the sum of £222, 12s. was expended on the same farms between Martinmas 1810 and 1811; and £162, 5s. between Martinmas 1812 and Martinmas 1813. After some intermediate notices as to other parts of the estate, £257, 0s. 9½d. were laid out under the above notice between Martinmas 1815 and Martinmas 1816. The accounts and vouchers relative to these were similar to those which have been quoted.

On the 15th January 1812, a *second* notice, similar to the first, was given, under which £162, 5s. 7d. was expended on High Grange, and the account and receipt by the tenant were expressed in a similar manner.

A *third* notice was sent on the 1st October 1812, by which Mr and Mrs Torrance intimated, 'that we intend to make the 'following improvements, alterations, and additions to the house 'of Grange, offices, and stables, viz. to repair and finish the 'garret story of the mansion-house, which has never been done; 'to repair the stables, and put new hacks and mangers therein, 'and to finish and plaster the coach-house; to erect a new shade or 'coal-house, and a kitchen porch, and to pave the scullery, and to 'repair the pediment on front door, and to put lead rones or pipes 'about the house and byre, and to cast and paint the outside of 'the house, and to put marble jambs in the dining-room, of all 'which we give you notice.' Under this intimation £154 were expended in building a garden-house, and the voucher consisted of a specific account, with a receipt by Thomas King, the

May 26, 1826. person employed to do the work; but it was not subscribed by Mrs Torrance.

On the 13th of June 1814, a *fourth* notice was given of an intention 'to inclose and plant parts of the farm of High Grange 'and Meadownay, and to drain some ground in the immediate 'vicinity of Grange House.' Accordingly this was done, and specific accounts and vouchers for £49, 6s. 11d. duly recorded.

A *fifth* intimation was made on 3d December 1814, 'that I in-'tend to close and plant part of the grounds round the house 'which are in my own occupation, which will both give shel-'ter and beauty to the place;' and, in consequence, £40, 12s. 3d. were laid out, and of which the vouchers were recorded.

A *sixth* notice was given in April 1817, under which a claim was made for £62, 18s. 11d.

An action of declarator, founded on the above statute, was afterwards brought against Mr Craufuird by Mrs Torrance, with consent of her husband, stating that she had laid out £1572, 10s. 3½d., for three-fourths of which, being £1179, 7s. 8½d., she was a creditor of the succeeding heirs of entail; and concluded, 'that the said Archibald Craufuird, or the next heir 'who is entitled to succeed after the pursuer, the said Mrs 'Marion M'Mikin Torrance, shall be liable to her, her heirs, 'executors, or assignees, in payment of the said sum of £1179, '7s. 8½d, with the interest thereof, from the term when the said 'Archibald Craufuird, or the heir entitled to succeed after the 'pursuer, their right to the rents of the foresaid lands shall 'commence; and that the heirs, executors, or assignees of the 'pursuer, shall have right and be entitled to demand and recover 'payment thereof, as pointed out by the said statute, conform 'to the foresaid act of Parliament, registered vouchers, intima-'tions and extracts thereof libelled on.' Under this general claim there were embraced the several sums expended on the estate, relative to which notices had been given. There was no conclusion for expenses.

In defence, Mr Craufuird objected,

1. That the notices (with the exception of that of the 1st October 1812, relative to the mansion-house) were to ogeneral in their description of the improvements intended to be made—that, in particular, the notice of the 12th June 1810, merely stated that 'a new dwelling-house,' 'some additional houses,' 'a 'new barn, stable, byre, and other offices,' were to be erected; but that it ought to have specified distinctly the kind or description of houses which it was proposed to build, so as to show whether they were suitable to the farm or not.

2. That although it is enacted that three months notice shall

be given to the heir before the improvements are commenced; May 26, 1826.
yet that (with one or two exceptions) they had been begun before the notices were sent; and, in particular, that although the first notice was served on him on the 12th of June 1810, yet it was stated in the accounts and vouchers that the improvements had been made between Martinmas 1809 and Martinmas 1810.

3. That it was incompetent, after the lapse of so long a period, and after intervening notices as to other improvements, to make those in 1816 under the notice given in 1810; and,

4. That the accounts ought to have specified the particulars which had been expended, and for what purposes, and that it was not sufficient to state generally that a slump sum had been paid; and besides they were not subscribed by the heir in possession.

To this it was answered,

1. That the statute merely required that the notice should state 'the kind of improvements intended, and the farms upon which 'the improvements are intended to be made,'—that it did not require that a specific and accurate detail of the improvements should be given, or a plan exhibited either of the houses, of the drains, or of the dykes, but merely what was the kind of improvement intended to be executed.

2. That it was an error in point of fact to allege that the improvements had been begun before the lapse of the three months, because it was proved by the documents produced that they had not been so.

3. That due notice had been given in June 1810, of the proposed improvements, and that it was not a valid objection that they had not been executed till six years thereafter; and,

4. That the statute did not ordain that a specification of particulars should be recorded, but merely in general terms, 'that 'an account of money expended by him in such improvements,' with the necessary vouchers, should be recorded; that accordingly this had been complied with; and it was not denied that the money had been so expended.

'The Lord Ordinary reported the case, in respect the question relates to a statute now in daily operation, and the construction of the clauses founded on by the objector (Mr Craufuird), which are expressed in very general terms, is of the 'greatest importance, not only to every heir of entail availing 'himself of it, but to the country at large giving credit upon 'the faith of it, and this case therefore cannot be too speedily 'decided, or too generally promulgated.' On advising the informations, the Court, on the 1st December 1820,* repelled

* See Fac. Coll. No. 55.

May 28, 1828. 'the objections proponed by the defender, found that the outlay 'condescended on has been duly made and authenticated in terms 'of the act, and therefore decerned in terms of the libel, and 'found expenses due.'

The Judges were of opinion, that the act of Parliament, which was of a beneficial nature, and intended for the improvement of the country at large, ought to be given effect to upon the most liberal principles, and only required to be substantially obeyed, without a rigid and critical observance of its precise provisions; that in several respects it was impracticable to obey it literally; and that in this case it had been bona fide observed.

Mr Craufuird appealed, and having thereafter died, the appeal was revived in the name of his eldest son.

Appellant.—The directions and injunctions of the statute have not been followed out. They must be explicitly and in terminis obeyed. It is not enough, that de facto, the money may have been beneficially expended on the estate. The expenditure must be regulated by the statutory provisions; otherwise no charge is created against the succeeding heirs. It was incompetent to award expenses against the appellant in an action of declarator. The statute provides for costs being given in an action for payment against the succeeding heir, but not in an action of this kind. Besides, the summons does not conclude for expenses.

Respondent.—The object of the statute was to encourage improvements on entailed estates, not to clog the heir improving with directions so minute, and of such strict interpretation, as contended for by the appellant, and which would render the statute totally abortive. The respondents bona fide implemented the provisions of the statute, according to their sound import and meaning. The statute does not prohibit expenses being given, but is silent, leaving them to be awarded if the Court shall see cause to find them due.

The House of Lords ordered and adjudged, 'that the interlo-'cutors complained of in the said appeal be, and the same are 'hereby reversed, except as to the sum of £280, 5s. 8d., being 'three-fourths of the sum of £154, 2s. 7d., expended in building 'a garden-house at Grange House,—and of the sums of £49, 6s. '1½d., £40, 12s. 5d., and £62, 18s. 11d., expended on the said 'entailed estate for draining and planting; as to which it is 'further ordered and adjudged, that the said interlocutors be, 'and the same are hereby affirmed: And it is further ordered

'and adjudged, that the said interlocutors, with respect to the 'costs thereby awarded against the appellant, be, and the same 'are hereby reversed; and it is further ordered, that the cause 'be remitted back to the Court of Session in Scotland, to pro- 'ceed further therein as is consistent with this judgment, and 'as is just.' May 26, 1826.

Lord Gifford.—My Lords, this is a case which was heard before your Lordships the session before last, and in consequence of the death of one of the parties, the cause abated; since which, as I am informed, the cause has been revived and sent back to your Lordships, and it now stands for your Lordships' judgment.

This was an action brought by Mrs Marion M'Mikin Torrance, and George M'Mikin Torrance, her husband, she being heir of entail of a considerable estate in the county of Ayr in Scotland, against the next heir of entail, in order to have it established that she had, in the terms of the Act of Parliament 10 Geo. 3, c. 51, properly expended very large sums, by which she became a just and lawful creditor on the said entailed estates, and of the succeeding heirs of entail of the said estates, to the amount of three-fourths of that expenditure.

By that act, which is entitled, 'an act to encourage the improvement of 'lands, tenements, and hereditaments, in that part of Great Britain called 'Scotland, held under settlement of strict entail,'—it is enacted, &c. (His Lordship here read the preamble and provisions of the statute.) By this statute the executor and assignee, or other person having right to the claim arising from money so expended, may, after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate, to pay the whole, or such part thereof as is due—and not only is that enacted, but the statute also enables him, in order to prove the expenditure incurred by him, to institute an action, as it is called, of declarator, against the next succeeding heir in his lifetime, in order to have it established before the Sheriff, or, if he sees fit, before the Court of Session, in order to fix the amount of expenditure, and thereby to establish, by the judgment of the Court, the amount of the claim which he may have against him.

It is under this section of the act that this action is brought—Mrs Torrance, with her husband, contending, that having complied with the terms of the Act of Parliament, she is entitled to be declared a creditor against the succeeding heirs of entail to the amount of £1179, 7s. 8½d., being three-fourths of £1572, 10s. 3½d., which she says she expended in the improvement of this entailed estate. My Lords, it will be necessary for me shortly to state the facts of this case, before I propose to your Lordships the judgment.

The first intimation which she gave of her intention to make such improvements, was on the 12th June 1810, and then she gave the following notice. (His Lordship then read it.) My Lords, she says that in consequence of this notice, in the year beginning at Martinmas 1809, and ending Martinmas 1810, she expended on the farm of Laigh Grange the sum of

May 26, 1826. £424, 10s.; and on the farm of Milton and High Grange, the sum of £198, 8s.—making in all £622, 18s.; and that she lodged the proper vouchers for that expenditure.

The vouchers which she lodged were not the accounts of the persons employed in erecting those buildings and making those improvements, but receipts from the tenants, of sums in gross, which they acknowledged to have received for the buildings and other improvements. It was objected by Mr Craufuird in the Court below, and upon appeal to your Lordships, that those were not the vouchers required by this act—that the vouchers were those which could give evidence of the nature of the work done, and receipts of the sums paid; but that general receipts of £159, 10s. for building a barn,—also the further sum of £265 for building a byre, milch-house, and stables, all on the farm of Laigh Grange, amounting in all to £424, 10s.—and another from another tenant for sums laid out on the farm of Milton, possessed by Robert Allan, as per Robert Allan's receipt, £107, 3s. 7d. were insufficient, according to the terms of this Act of Parliament. There were other objections, with which I will not trouble your Lordships.

He objected also to the generality of the notice, and that it did not sufficiently appear, that the work for this sum of £682, 18s. was charged as being done after the expiration of three months from the giving of the notice. Your Lordships observe, that the party is not entitled to begin until after the expiration of three months from the notice, in order to give an opportunity to the heir of tailzie to watch the progress of the improvements.

The next claim which she made was for the sum of £222, 12s., which she said had been expended between Martinmas 1810 and Martinmas 1811, under the same notice given in 1810; and which sum was expended in erecting a dwelling-house upon the farm of Laigh Grange, building a byre on the farm of Milton, and two servants' houses built upon the farm of High Grange, at the village of Slateford. Now, my Lords, for this she produces no vouchers of the description I have stated, and which, it seems, she should have produced, from the persons employed in the work. But her account was, that she had allowed one of the tenants £100 towards the building of the house; for building a byre on the farm of Milton £62, 12s.; for two servants' houses built upon the farm of High Grange, at the village of Slateford, £60,—being in all £222, 12s.

At the time when this case was discussed, in which I also had the assistance of a noble and learned Lord (Lord Redesdale), his opinion as well as my own was, that these were not the sort of vouchers required by the Act of Parliament; and therefore we had very little difficulty in our own minds that the claim was not made out. I ought to have stated to your Lordships, that the Court below had sanctioned this claim to the full extent.

My Lords, a third claim was made for £162, 5s. 7d. expended (still under the same notice of 12th June 1810) in the year between Martinmas 1812 and Martinmas 1813; and that was for a byre and cart-shed, erected at High Grange on 11th November 1812; and for that the re-

spondent produced this voucher from Mr Galt, who was a tenant: 'Re- May 26, 1826.
'ceived from Mrs M'Mikin Torrance the sum of £162, 5s. 7d., agreeably
'to a clause in my lease for the farm of High Grange, for building a byre,
'cart-shed, &c., erected by me between Martinmas 1811 and Martinmas
'1812.' My Lords, what agreement this lady and gentleman might have made with their tenant is nothing to the heir of entail. He was entitled to have due notice, to see that the money was properly expended—and proper vouchers for the money charged, as having been laid out in the improvements; therefore, there was the same objection to this voucher as there was to the antecedent ones.

The next claim was for the sum of £154, 2s. 7d. expended in the improvements in the mansion-house and offices, between Martinmas 1812 and Martinmas 1813—that was for erecting a garden-house, near the mansion-house, at Grange; and then, for the first time, certainly the respondent produced, what appears to me a voucher within the provision of this Act of Parliament. She produced the voucher of the builder, enumerating and specifying the work done. I thought it right to take the trouble of going through these vouchers produced in the Court below. This which I now hold in my hand, is an account rendered by Thomas King, for building a garden-house, amounting to £154, 2s. 7d. I should state that Mr Craufuird, in his papers in the Court of Session, fully admitted, that for this expenditure there were proper vouchers.—I will read to your Lordships what he states in his papers below. (His Lordship then read a passage in the appellant's information, admitting that article.) It does, however, appear, my Lords, that independently of the admission that the voucher produced for this £154, 2s. 7d. was the sort of voucher which the Act of Parliament required, the notification was also in terms of the Act of Parliament; therefore it appears to me, that with respect to that sum it ought to have been allowed.

The next claim, my Lords, was for the sum of £49, 6s. 11d. for draining. The notice applicable was given on the 10th June 1814, that it was the intention of Mrs Torrance to drain the grounds in the immediate vicinity of Grange House. Of that expenditure the proper vouchers were produced—the accounts and receipts of the parties doing the work. With respect to that expenditure, there are some minute criticisms by Mr Craufuird, that there was a probability that the work was not done after notice was given, but that it might have been done before the notice. But I think, looking to the vouchers themselves, that there is nothing inconsistent with respect to the work having been done within the period specified; and as Mr Craufuird himself admits the accuracy of the vouchers, it would be hard upon this lady to reduce her claim with respect to this sum. And being of opinion that the vouchers instruct sufficiently that the work was done within the period, I think your Lordships may safely act upon that evidence, and may allow to her that expenditure.

The same, I think, applies to the next charge of £40, 12s. 5d., which sum was expended in inclosing and planting ground about the house, for which there are accurate vouchers. Mr Craufuird objects to this charge on the ground of these operations having been begun before the notice was

May 26, 1826. given, although he admits there are proper vouchers of every sixpence of the expenditure; but, my Lords, I think, upon these vouchers, I should propose to your Lordships to allow this claim.

My Lords, the next sum stands on a very different footing. It amounts to £257, 13s. 9d. expended between the year 1815 and 1816—and that is for building a feeding byre and granary on the farm of Laigh Grange. Your Lordships will recollect that the first intimation with respect to the general improvements of the farm was on 12th June 1810,—and with respect to the buildings, to which the notice referred in the year 1810, 1811, and 1812, vouchers were produced as described; and then your Lordships will find, after that year fresh notices are sent with respect to other improvements, draining, planting, and so on. But then, although from the year 1813 to the year 1816, there was an interval of three years, during which no buildings were going on, Mrs Torrance maintains, 'I have a right to say in the year 1816, I will go back to my notice 'in the year 1810. I give you no fresh notice, but refer the buildings I 'am about to erect, and other improvements, to the notice given in that 'year.' Now it appears to me, my Lords, and particularly when I find them giving an additional notice themselves in the year 1817, that it would be a very strange thing to say, 'If I gave notice in 1810—follow-'ing that notice by an annual account, as your Lordships see there is an 'annual account—having completed the buildings in 1812, and then 'never thinking of making any additional improvements, or giving any 'notice of any buildings on the farm, I shall be entitled afterwards at any 'distant period to say, I will not give you a fresh notice, but I will go 'on under the notice in 1810; and therefore what I do in 1816, I will 'charge under the notice which I gave in 1810.'—The notice in 1810 could, my Lords, hardly apply to the improvements which were made in 1816.

The last charge, my Lords, is £62, 18s. 11d. for draining under the intimation of the 26th April 1817, for which there appears to have been proper vouchers; and the present appellant himself says, 'that he is per-'fectly satisfied, from looking at the extract, that some of this work was per-'formed before the three months after the notice had expired; but to show 'that he has no wish to press any objection that may appear captious or 'critical, as has been attributed to him, he has not urged this point.' He appears to be perfectly satisfied with respect to that sum, for which there are proper vouchers, under the Act of Parliament. I should therefore propose to your Lordships to allow that sum and the others I have pointed out; and to disallow the others, to which I have directed your attention, for the reasons I have given, that there are no proper vouchers to support them.

My Lords, the Court of Session have not only fixed the heir of tailzie with three-fourths of the whole expenditure, but they fix him with costs. And, my Lords, it was contended at your Lordships' bar, that they had no authority to give costs in this case. The object of the action, your Lordships perceive, is to establish the claim of the heir in possession, against the succeeding heir of entail; and your Lordships will recollect, as I have

stated, that by the Act of Parliament the representatives of the heir of entail after his death have a right to raise an action against the succeeding heir of entail,—and if in such an action, when it is brought by the representative of the heir of entail, he should refuse to pay the money required of him under the authority of the act, and then decree shall be obtained against him, for the whole of the sum or sums of money of which he shall be required to make payment, in case it is declared that the defender be liable in full costs of suit, and if decree is not obtained for the full sum or sums of money, of which payment has been required, it shall be in the discretion of the Court to award costs of suit to either party, as the justice of the cause shall direct. In that case, therefore, the Act of Parliament has given costs against the succeeding heir of entail, if the whole claim shall be established against him; and I will state, my Lords, that the probable reason why no action is to be commenced against the succeeding heir of entail until twelve months after his death, is to give him an opportunity to see whether the expenditure had been properly incurred; and therefore it says, after you have had good opportunity of examining the vouchers—having had full opportunity to ascertain and consider whether the improvements have been made agreeably to the terms of this act or not; you ought to pay the amount, and if you do not you shall be liable in costs. But then there follows the section, which is the ground of declarator relative to proceeding at the instance of the heir in possession in his lifetime; but it says nothing at all upon the subject of costs. My Lords, I think in this case the Court of Session were not justified in giving costs. The effect of the judgment I shall take the liberty of proposing to your Lordships, will be to reverse the interlocutors, except for the sums I have mentioned. I have drawn out a sketch of the judgment, which makes the computation of those sums, and the amount for which the judgment should be pronounced against the gentleman. I should propose to your Lordships to reverse the interlocutors complained of, except as to the sums of £154, 2s. 7d. for improvements on the mansion-house,—£49, 6s. 11d. for draining,—£40, 12s. 5d. for inclosing and planting, and £62, 18s. 11d. for draining; to affirm the interlocutors with respect to those sums, but reverse them with respect to the remainder, and also as to the costs awarded against the appellant. My Lords, after a very anxious consideration of these papers, and going through the various vouchers, I am satisfied that the judgment I submit to your Lordships will not only be consistent with law, but with the justice of the case. For the reasons I have given, I think, my Lords, the interlocutor can only be supported to the extent of the amount I have mentioned.

May 26, 1826.

Appellant's Authorities.—Elliot v. Elliot, Jan. 22, 1793.—(15622.)—Finlayson v. Munro.—December 12, 1821, (1 Shaw and Ball. No. 243.)—Chisholm v. Chisholm, Dec. 1, 1820.

J. RICHARDSON—J. CAMPBELL, *Solicitors.*

No. 33. Lady Mary Lindsay Craufurd, Appellant.—*Warren—Adam.*

Col. W. C. Campbell, Respondent.—*Keay—John Campbell.*

Jurisdiction.—Exhibition.—Peerage.—Held (reversing the judgment of the Court of Session) that a party who had been served heir of provision under a charter conveying lands and the dignity of a peerage, but whose right to the peerage had not been ascertained or recognized by the Crown, was not entitled to insist in an action against another party having right to the lands, concluding for exhibition and delivery of all titles relative to the peerage as his own proper writs.

May 26, 1826.
1st Division.
Lord Alloway.

John Earl of Craufurd and Lindsay, Lord High Treasurer of Scotland, lived during the middle of the 16th century. On the 28th of April 1648, he obtained a charter, said to have been granted under the sign-manual of Charles I., proceeding on a resignation in the hands of the Crown of the estates and honours of the family of Craufurd and Lindsay, and by which his Majesty reconveyed them to the Earl in liferent, 'et Gulielmo 'Domino Parbroath ejus filio legitimo maximo et hæredibus mas-'culis de corpore suo legitimè procreandis; quibus deficientibus 'Patricio Lindsay filio legitimo secundo dicti Comitis et hære-'dibus masculis de suo corpore legitimè procreandis; quibus de-'ficientibus hæredibus masculis quibuscunque dicti Comitis de 'suo corpore legitimè procreandis; quibus deficientibus natu maximæ hæredum femellarum procreandæ de corpore prefati 'Gulielmi Domini Parbroath illa omnimodo habente alicui cog-'nominis Lindsay qui assumet cognomen et insignia domus et 'familiæ de Craufurd Lindsay et hæredibus masculis de corpore 'dictæ filiæ dictum cognomen et insignia de Lindsay geren-'tibus.' The charter was recorded in the register of the great seal, and infeftment passed on it in June of the same year. The dignities and family estates descended through males to George Earl of Craufurd and Lindsay, who died without lawful issue in 1808.

In 1800, a new entail of the estates was executed, in virtue of which Lady Mary Lindsay Craufurd, sister of the last Earl, and heir of line of the Treasurer's youngest son, succeeded to the estates. Several competitors then appeared for the honours, and in 1820, the respondent, Colonel William Claud Campbell, founding on a copy of the above charter, (extracted from the register of the great seal,) as heir male and of line of Lady Mary Campbell, his grandmother, the nearest heir-female of the body of the eldest son of the Treasurer, obtained himself

served heir of provision in general of the last Earl in the honours. May 26, 1826.

Thereafter, Colonel Campbell raised in the Court of Session, an action of exhibition and delivery against Lady Mary Lindsay Craufurd, stating in the libel his service as heir of provision under the charter of 1648, and that, as such, he was entitled to call for exhibition and delivery of all writings and titles in which he had any interest under that charter; and concluding, that Lady Mary should be decerned and ordained to exhibit and produce certain writings there enumerated, and all other writings, rights, and titles, in her possession and custody, relating to the transmission of the honours, dignities, and estates of the Earldom of Craufurd and Lindsay, which should be condescended on by him in the course of the procedure to follow. In defence Lady Mary contended, that if the exhibition were required with a view to claim the family estates, the pursuer had no right to the estates, or to demand production of the deeds relating to them (a point settled in a former process); that if it was for the purpose of making out a claim to the peerage, the Court of Session was not the competent court; and that the deed 1648 was not under the sign-manual of Charles I., who was at its date a prisoner in Carrisbrook Castle, but had been granted by the Barons of Exchequer, and so was not capable of bestowing honours. Colonel Campbell then amended his libel, by restricting his demand of exhibition and delivery to the writings specified in his summons, in so far as they related to the honours and dignities—concluding, 'that such of the said writs as relate only 'to honours and dignities, should be decerned and ordained to be 'given and delivered up to the pursuer, to be used and disposed 'of by him as his own proper writs and evidents; and such of 'them as relate to the estates, as well as honours, ought to be 'made forthcoming to him on all necessary occasions, on receipt 'and obligation for re-delivery within a certain time, under a 'suitable penalty.'

The deeds called for were—Patent in favour of Ludovic Earl of Craufurd, 12th October 1641, or January 1642,—Ratification of the entail recited therein by Charles I. in Parliament, 1641,—Mutual entail or contract between Ludovic and John Earl of Lindsay,—Instrument of resignation thereon,—Decreet of forfeiture by Parliament of Scotland against the Earl of Craufurd, dated 25th July 1644,—Ratification by the Scotch Parliament in favour of Earl of Lindsay, anent his right or patent of Earl of Craufurd, 25th July 1644,—Parliamentary ratification in favour of John Lord Lindsay, of his patent of Earl

May 26, 1826. of Lindsay, 18th May 1633,—and of a charter of part of the estates, reciting and confirming the charter of resignation or patent of Ludovic Earl of Craufurd, 1642,—Disposition or deed of entail about 1648, by John Earl of Craufurd and Lindsay, of the honours and estates of Craufurd and Lindsay, in favour of himself and the heirs-male of his body, whom failing, to his heirs-female, &c.,—Instrument of resignation in terms thereof, about 1648,—The charter in terms of the above deed, 1st March 1648,—The signature,—The instrument of seisin, 9th June 1648, —Ratification of the Parliament of Scotland to the Earl of Craufurd and Lindsay, and Lord Parbroath, his son, 11th May 1648, and ratification in favour of the Earl of Craufurd, of the Earldom of Craufurd, 12th July 1661.

The Lord Ordinary having reported the case on informations,

Lord Hermand observed—This is truly an action of exhibition ad deliberandum—to judge of the prudence and expediency of claiming the peerage. The pursuer is entitled to the exhibition. It is admitted that he cannot obtain it in the House of Lords. If, therefore, we refuse it, there will be a wrong without a remedy. But we are bound to do justice, and to cause these deeds to be exhibited in which he has an interest. This, however, ought to be done under the superintendence of the Clerk of Court.

Lord Gillies.—Lady Mary is legally in possession of the title-deeds. This is an action calling on her to exhibit and deliver them, and the ground on which this demand is placed is, that Colonel Campbell has been served heir to the honours. He admits that he has no right whatever to the lands, and that his sole object is to support his right to the peerage, which, he alleges, belongs to him. So far as any question of a patrimonial nature arises, we are entitled to judge incidentally of a claim to a peerage: but where no such patrimonial right is involved, we have no jurisdiction whatever. The peerage is to us a mere nonentity, which cannot form the subject of decision. But what right has Colonel Campbell to make his present demand? He says that the peerage belongs to him, and that he will prove it by the deeds condescended on. We are thus called on to judge of his right to the peerage, not incidentally, so as to decide a patrimonial question, but to the effect of supplying him with the proof of that peerage. In relation to us, however, the peerage is a mere nonentity, and if so, how can we entertain an action relative to the evidence of it? In whatever light the case is viewed, it is altogether novel and anomalous. Colonel Campbell must present a petition to the Crown, and a remit

will then be made to the House of Lords, to inquire, and, of course, with power to cause the means of evidence to be produced. We, however, have no authority to do so. May 26, 1830.

Lord Balgray.—I agree with Lord Hermand. By our law it is competent to raise an action for exhibition of titles which contain the evidence of any right in favour of the pursuer. See the example of a summons of exhibition given by Lord Stair. A peerage is a right suæ naturæ. Lady Mary does not claim it. Colonel Campbell has been served heir to it. The titles of that peerage are in the same deeds as those which contain the titles of the estates. Colonel Campbell has, therefore, as much right to have access to these deeds, in order to show the right to the peerage, as Lady Mary has to instruct her right to the lands. The inspection, however, must be made by one of the Clerks of Court.

Lord Succoth.—I concur with Lord Gillies. Colonel Campbell has no right to insist here for production of the title-deeds. He says, that the House of Lords cannot grant an order for production. I do not think that can be correct. If the House of Lords be authorized to inquire and investigate, they must have the power of doing so, and, consequently, of ordering evidence to be produced. But what title has Colonel Campbell to pursue this action? It is said that he has an interest, and must therefore have a title. But what is his interest? It is that he has right to the peerage. We cannot, however, inquire whether he has or has not. He is seeking merely for evidence, and not to vindicate a patrimonial right.

Lord President.—I am of the same opinion as Lords Hermand and Balgray. I do not mean to judge of the right to the peerage. Colonel Campbell has been served heir to it: and, by virtue of this service, he claims right to the title-deeds which are accessary to it. I apprehend that he has right to exhibition of these titles. It is said that Lady Mary has possession of the titles. No doubt she has; but the titles may contain other rights than those in which she is interested. In relation to such deeds she has no exclusive property. She holds them like an heir-portioner, for behoof of all concerned. So far, therefore, as they form part of the titles to the peerage, Colonel Campbell is entitled to see them, through the medium of an officer of Court.

The Court, therefore, on the 9th July 1823, sustained the amendment, and before further answer, 'remitted to Sir Robert 'Dundas, Mr Macdonald Buchanan, or Mr Colin Mackenzie, '(Clerks of Court,) or either of them, to examine Lady Mary

May 26, 1826. 'Lindsay Craufurd's charter-chest, or other repositories, containing the family papers, for the deeds called for by the pursuer in his information, and to select the same if found; and with full power to take the depositions of havers, and granted commission and diligence for that purpose accordingly,' and to report the same.

Lady Mary having presented a petition against this judgment, and answers having been ordered and thereafter advised,—

Lord Hermand observed—Lady Mary complains much that we have given an order to Colonel Campbell to rummage her charter-chest. We have not done so. We have empowered the officers of Court to examine it, and select those deeds in which Colonel Campbell has an interest. This has been often done before, and unless we authorize it to be done, there is no other Court which can give redress. In questions of this kind the House of Lords are merely the Commissioners of the King, not a Court of justice.

Lord Balgray.—I never saw any difficulty in this case. Such a search as we have authorized must take place daily where heirs exist having different rights constituted by the same deeds. Here Colonel Campbell has shown by his service a right of a particular nature, and he is entitled to have access to the titles connected with it. By the service his name is as it were inserted in these deeds, and if this had been done de facto, could it be maintained that he was not entitled to delivery of them?—Certainly not. But Lady Mary says she wishes to know what he intends to do with the deeds. She has no right to know this; and it is sufficient that we have effectually protected her interests from being injured. Being heir of provision, and served as such, Colonel Campbell has clearly a right to demand all the deeds connected with the title so constituted in him.

Lord Gillies.—I see great difficulty and much danger if our judgment stand. There is nothing which ought to be kept so sacred as a charter-chest. It is impossible to know what may be discovered or what injury we may inflict by allowing it to be searched. See the terms of the interlocutor. You have authorized a search to be made into the 'charter-chest or other repositories containing the family papers.' But there has been already a litigation for this very estate, and it may happen that the very first deed which is turned up may be of a nature to give rise to a new lawsuit, as being noviter repertum. I can never give my sanction to such a search-warrant. But, in considering the question of right we must revert to elementary principles. It is undoubted that there can be no property nor

right in title-deeds except what flows from a right or title existing in the party claiming those deeds, and thereby constituted in his favour. It follows, therefore, that it is only that Court which has jurisdiction to judge of the principal right that can decide as to the accessary. But here it is admitted that there is no patrimonial claim even to the extent of one sixpence. There is nothing but a claim for a peerage, the right to which has not been ascertained. How is it possible then to listen to the demand made by Colonel Campbell? We have no jurisdiction to entertain that question. May 26, 1826.

Lord Succoth concurred.

Lord President adhered to his former opinion.

The Court, therefore, on the 25th of February 1824, adhered.*

Lady Mary appealed.

Appellant.—The Court, before deciding on the respondent's right, have exposed the appellant's charter-chest and other repositories, containing the family muniments, to be broken open, rummaged, and made patent to all the world. It is no answer to say that if she refuses exhibition the Clerks have only to report that fact,—for she would thereby be guilty of a contempt,—to avoid which she must open, or allow to be forced open, any place or spot where they may even suspect the deeds to be. Even in the case where the production of the deeds is necessary, the party making the requisition must show that he has a positive interest in the writings called for. But, prior to 1648, female succession had no place in this family, either as to estates or honours. The charter of that year did not pass under the royal sign-manual, and can be of no avail to the respondent as to honours. If it do exist, it is a title to the appellant's estates, in which the respondent has no interest. Even if he had an interest, he should betake himself to the usual remedy, and not arm himself with what is equivalent to a general search-warrant. Besides, these deeds being movables, do not descend to the heir.

Lord Gifford.—Is there any precedent for such an order?

Warren.—We deny that there is. The order of which we complain is altogether different from the conclusions of an usual action of exhibition. The respondent's object is quite different. He claims the property of the deeds, not the mere access to them.

* See 2 Shaw and Dunlop, No. 678.

May 26, 1826. *Respondent.*—This is a substantive action for recovery of deeds, on the ground of the respondent's right of property in them. It is an action known in the Scotch Law, and is the competent process recognised in practice. The deeds are not to be regarded as mere parchment and wax, and so executry, but as patents of nobility, and the property (sole, or in common, according as they do or do not include title to the lands) of the respondent. It is a mistake to say that the respondent could force open the repositories.—Doors cannot be opened without letters of 'open doors.' Even messengers-at-arms must have that diligence. If Lady Mary, when asked, declares that she has not the deeds—or refuses access to them, or will not give them up—the Clerks can only so report. If the Court considered this a contempt, they may proceed in the way they think proper; but under this order, the premises cannot be forced. The Clerks have no such powers. If refused admission they must withdraw. Their power may be compared to a mandamus, with a return to the day named in the order. It is a danger common to all actions of exhibition that the supposed custodier may deny the possession. The respondent asks nothing unreasonable; if he be entitled to production, and eventually to delivery, it is the same to him in what mode the order is to be executed. It is not the respondent or his agent who goes to make the search, but the Court, represented by their officers. The respondent's interest is undeniable—and the appellant does not pretend any right to the honours of the family. If the Court of Session were not competent to entertain the question, the respondent has no other tribunal from which to require redress. Besides, this is truly an abstract point involving a civil right of property, and must be judged of by the Court below. In the Court of Session, the appellant never complained of the manner in which the order was worded—but merely that the respondent had no interest to seek exhibition.

Lord Gifford.—One of the Judges considered this as a novel proceeding.

Campbell.—But his Lordship rested that opinion on the ground that there could be no property in the title-deeds—not that there was anything informal in the shape of the proceedings, if the respondent had an interest. We maintain that a right belonging to the respondent flows from, and is dependent on this charter of 1648, whose production we seek. The respondent is not a stranger, but the party interested. A committee of privileges could not enforce the delivery.

Lord Redesdale.—The power of taking the proof is commit-

ted to a committee of privileges. But all orders emanate from this House. The King constitutes this House with power to judge instead of himself. May 26, 1826.

Campbell.—Therefore the committee of privileges could not decide on any question of property. Recourse must be had to the Court of Session. A prima facie evidence of right is sufficient to warrant the conclusion in an action of exhibition. If, on the death of a Peer, his heir were deprived of his patent, could not the heir institute an action to recover it? Aware of this, the appellant maintains that the respondent cannot make out a prima facie case; and alleges that the charter 1648 bears date at Edinburgh, where his majesty was not; and that the resignation was made not in his hands, but in the hands of the Barons of Exchequer (according to the office copy), and therefore cannot bear the royal sign-manual, nor confer honours. But when the time for entering on that point arrives, the respondent will show that the charter does convey the peerage, and that he is entitled to the honours.

Lord Redesdale.—The charter 1648 being on the public records, what does the respondent want more?

Keay.—In the register of the great seal, there is lodged only an office copy of the charter. The original is not left. The copy we have had access to, has been somewhat injured by time; and we have an interest to have inspection of the original, to see whether it is open to any objections, before incurring any expense of further procedure. The charter is the common property of both parties.

Lord Redesdale.—But you must establish your right to the charter 1648, before you found on the preceding titles.

Keay.—The charter 1648 is not an original grant. It proceeds on a resignation; but we are entitled to see the right of the Earl to make the resignation. We must see the original charter.

The House of Lords ordered and adjudged, that 'the said interlocutors complained of in the said appeal be, and the same are hereby reversed, and that the defender be assoilzied.'

Lord Gifford.—There is a case which stands for the judgment of your Lordships, in which Lady Mary Craufurd is the appellant, and William Cland Campbell, Esq. is the respondent. The interlocutor which has been brought before your Lordships arises out of an action instituted by the respondent, Colonel Campbell, against the appellant, Lady Mary Lindsay Craufurd, seeking to recover from her various documents in her possession, relating to the titles and dignities of the Earldom of Craufurd and Lindsay. The original summons in this case on the part

May 26, 1826. of the respondent Colonel Campbell, stated, 'that he had been served 'heir of provision in general to the deceased George Earl of Craufurd 'and Lindsay, in terms of a charter of Resignation under the Great Seal, 'dated March the first, 1648, granted by King Charles the First to 'John Earl of Craufurd and Lindsay, then Lord High Treasurer of 'Scotland, in liferent, and William Lord Parbroath, his eldest son, in 'fee, and the heirs-male lawfully procreated of his body,—whom failing, 'to Patrick Lindsay, second lawful son of the said John Earl of Craufurd 'and Lindsay, and the heirs-male lawfully procreated of his body,— 'whom failing, to the heirs whatsoever of the said John Earl of Craufurd 'and Lindsay, lawfully procreated from his body,—whom failing, to the 'eldest heir-female procreated of the body of the said William Lord 'Parbroath, she always marrying one of the surname of Lindsay, or one 'who should assume the name and arms of the house and family of Craw- 'furd and Lindsay, and the heirs-male of the body of the said daughter 'bearing the said surname and arms of Lindsay,—whom failing, to the 'other heirs and substitutes therein mentioned, conform to retour of the 'pursuer's general service expede before the Bailies of the Canongate, 'dated the 21st day of March 1820, and duly retoured to Chancery. That 'by the charter his Majesty gave, granted, and conveyed to the said 'John Earl of Craufurd, William Lord Parbroath, and the other heirs 'above-specified, inter alia, the surname, designation, title, honour, and 'dignity of Earl of Craufurd and Lindsay, and all the privileges, pre- 'eminences, immunities, rights, and honours whatsoever thereto belonging 'in any manner of way. That the pursuer, as heir of provision served 'and retoured as aforesaid, has good and undoubted right to call for ex- 'hibition of the several writings, writs, and titles after-mentioned; and 'also of all other writings and titles in which he has any interest under 'the foresaid charter of Resignation.' Then he enumerated the instru- ments which he alleged ought to be produced by Lady Mary Craufurd.

My Lords, Lady Mary Craufurd put in defences to this action, in which she alleged that 'If the pursuer calls for the titles narrated in the 'summons, with a view to substantiate a claim to the estates of the family, 'he has no right to demand the exhibition. The defender is infeft in these 'estates, conform to a precept issuing from Chancery, and upon a desti- 'nation totally different from that contained in the charter 1648, and no 'previous entail existed to prevent the estates being settled in that manner; 'her right to them was ascertained by the judgment of the Court of Ses- 'sion in 1771, and the pursuer has no title whatever either to these 'estates, or to demand production of the title-deeds relating to them; and 'if the titles called for are intended to enable the pursuer to make out a 'claim to the Peerage, then his demand is incompetent in the Court of 'Session; the title of any claimant to honours and dignities must be esta- 'blished in the House of Peers, the only Court competent to try ques- 'tions of that description, and the demand for the production of papers 'which are to establish it must be made before the same tribunal.'

After this the respondent amended his summons. Your Lordships will perceive that by the original summons he called upon Lady Mary

Craufurd to exhibit all writings and titles in which he had an interest under the charter, and I shall hereafter mark the distinction in the law of Scotland as to actions of this nature. He amended his summons, and stated that he had a title and interest in these title-deeds so far as they related to the honours and dignities, but he expressly disclaimed having any right to them in respect of the estates, and therefore he amended his summons by inserting these words, namely, 'such of the said writs as 'relate only to the honours and dignities;' and he altered his summons also by calling not merely for an inspection, but a delivery of the deeds, and that Lady Mary Craufurd should be 'ordained to give and deliver 'them up to the pursuer, to be used and disposed by him as his 'own proper writs and evidents, and that such of them as relate to the 'estates, as well as honours, ought to be made forthcoming to him, the 'pursuer, on all necessary occasions, on receipt and obligation for re-de-'livery within a certain time, under a suitable penalty.' May 26, 1826.

To this amended summons Lady Mary Craufurd put in a defence stating, that if Colonel Campbell claimed those deeds on the ground that he was entitled to the dignity of Earl of Craufurd, that till he had established the right to that dignity, he could have no right to the deeds, and if they were called for to support his claim, then she contended that that would come before your Lordships' House, and that the Court of Session could have no jurisdiction upon the subject.

The matter coming before the Lord Ordinary, he reported it on informations, when the Court pronounced this interlocutor, which has been admitted at the bar to be one for which no instance or authority can be found: 'Having advised the informations for the parties, with the amend-'ment of the libel and additional defences, they sustain the said amend-'ment; and before further answer, remit to Sir Robert Dundas, Mr 'M'Donald Buchanan, or Mr Colin Mackenzie, or either of them, to 'examine Lady Mary Lindsay Craufurd's charter-chest, or other reposi-'tories containing the family papers, for the deeds called for by the pur-'suer in his information, and to select the same if found,'—so that the Court delegated an authority to one or other of these three gentlemen, to examine the charter-chest and repositories of Lady Mary Craufurd at their pleasure, and to any extent, and to select from those repositories the deeds in question, if they were there to be found.

My Lords, Lady Mary Craufurd complained of this finding by a petition to the Court, and on the case again coming before them, the Judges differed materially—the extreme injury to Lady Mary Craufurd, by having her deeds examined by any gentleman whatever, being strongly represented. However, the majority appear to have been of opinion that the interlocutor upon the whole was a right interlocutor, and they adhered to it, and in consequence of that an appeal has been brought to your Lordships' House.

I have stated that I would call your Lordships' attention to the nature of this action and of other actions, for the exhibition of deeds in Scotland. It appears that there are two kinds of actions of this description, one founded upon a right of possession, or right of property in the subjects them-

May 26, 1826. selves, in which the party calls upon the defender to deliver up the title-deeds. The one of these actions is called a substantive action, and the other is called an accessary action. If a party want, for the purpose of supporting any claim, the production of deeds or writs in the possession of another person, he institutes an action—which is called an action of exhibition ad probandum, and which is an accessary action,—not seeking to have the deeds delivered to the pursuer, but merely to have the benefit of them by way of evidence to support the claim upon which he is founding. There is also another action for exhibition, which is called an action of exhibition ad deliberandum, which is, where the heir, by the law of Scotland, being liable to his predecessor's debts, has a right to consider whether he will enter heir or not; and therefore he may call for production of the instruments for his inspection, in order that he may determine whether he will enter or not; and in both of these actions it seems that it is referred to the oath of verity of the party against whom the action is brought, to say whether the deeds are in his possession or not. In this case, your Lordships perceive there is no such claim in the summons, nor does the respondent seek to proceed in that mode touching these deeds. It is stated in the respondent's case, and was admitted in the Court below, 'that the action was a substantive action for the exhibition and delivery of writs, upon the sole ground of a right of property 'in them.' Then, my Lords, the question is, what right has this gentleman at present in these deeds? He can only have a right of property in them, either as making a title to the lands to which they relate, or to establish his claim to the dignity. As to the lands, he has expressly stated that he does not claim the deeds in respect of any right in the lands. With respect to the dignity, he admits that at present his claim has not been sustained; he styles himself in his summons, as your Lordships observe, 'Colonel Campbell.' Has he therefore a right of property in the deeds? It appears to me, with great deference to the Court of Session, that in order to make out his title to them he must make out, in one way or the other, a right of property in them. If it was for the production of them to support a claim which had been made, the action would have been of a very different description; it would be, not to give them up to the pursuer, but for the production of them by Lady Mary Craufurd; and according to the form of summons which my Lord Stair has given in his book, the conclusion of the summons would refer the matter to the oath of verity of the party, and in that view of it, I apprehend it would be impossible to sustain such an interlocutor as this; for your Lordships see by this interlocutor, the gentlemen appointed have not only a right to have access to the charter-chest, but to the house, and on its being put to the counsel, they said they did not know that they could force an entry into the house; but they seemed to admit that if Lady Mary Craufurd had refused them admission, she would have been guilty of contempt, and therefore an entrance into her house and her private repositories was necessarily implied. But, my Lords, I will not go into that. It appears to me, after considering this case, that the pursuer has failed in the present state of things to make out any title to the deeds.

His action is not, as I said before, for the exhibition of deeds to make out his claim, but to deliver the deeds to him, he founding upon the right of property in the deeds. He says, he has been served heir. Be it so; still he has not established his right to the dignity, and unless your Lordships have recognised his claim, he cannot say that he is entitled to the dignity of the Earldom of Craufurd and Lindsay. Upon these grounds, therefore, —that this is an action founded upon a right of property, and that he has failed in establishing that property upon his own showing; that in respect to the estates, he has not even claimed them; and that in respect of the dignity, he has not established any claim,—I think that these interlocutors must be reversed. Such a judgment will not prevent a proceeding on his part, on any future occasion, supposing him to have a ground for it. He may raise, if he is so advised, an action of exhibition ad probandum,—that accessary action to which I have referred,—or if at a future time he shall be found entitled to the dignity, the present form of action may be relevant. At present your Lordships see that the form of the action is founded upon the right of property, and the pursuer not having made out the right of property, it appears to me these interlocutors ought to be reversed, and judgment given for the appellant. May 26, 1826.

Respondent's Authorities.—Sutherland Case, p. 61.—1 Stair, 7. 14.—4 Erak. 1. 52.—Lady Mary Campbell v. Earl of Craufurd, Aug. 8, 1783 (3973).—Earl of Hume v. Johnson, July 4, 1623. (Haddington.)—Earl of Bredalbane, Feb. 21, 1741. —1 Erak. 3. 18.—Dunbar, Feb. 2, 1790 (7395).—MS. Index to Decisions of Hope, Durie, and Spottiswood, Ad Lib.—Ker, July 7, 1804 (7984).—Robertson's Ap. Cases, p. 400.—Kames' Hist. Law Tracts, p. 227.

J. RICHARDSON—J. CAMPBELL, *Solicitors.*

WM. MAULE, Esq., Appellant.—*Shadwell—Adam—Robertson.* **No. 34.**

HON. WILLIAM RAMSAY MAULE, and EARL of DALHOUSIE, Respondents.—*Brougham—Keay—James Campbell.*

Res Judicata—Circumstances in which it was held (reversing the judgment of the Court of Session), that a decree of the House of Lords did not form a res judicata as to a claim for certain leases; but affirming the judgment, in hoc statu, as to a claim to certain lands which had been found by an extracted decree to belong to the defender.

GEORGE Earl of Panmure, proprietor of the estates of Panmure, Brechin, Ballumbie, and Kelly, had two brothers, James and Harry. Prior to 1680, he disponed that of Ballumbie to his brother James, who, in 1681, made up titles in favour of himself and the heirs-male of his body; whom failing, to his younger brother Harry, and the heirs-male of his body, &c. under a strict entail. The estate of Kellie was purchased by May 26, 1826. 1st DIVISION. Lord Alloway.

May 26, 1826. Harry from Earl George, and, in 1687, he settled it, by his contract of marriage, upon the heirs-male of his marriage; whom failing, those of any other marriage; whom failing, the heirs-female of his body.

Earl George having died without issue, was succeeded by his brother James, who, in 1713, granted a bond for £9000 to his wife. Having joined in the rebellion of 1715, Earl James was attainted, and his estates forfeited. Harry Maule, however, claimed the estate of Ballumbie, under the substitution in the entail of it in his favour, and was found to have right to it. Of the above marriage, he had four sons, George, James, William, and John, the former of whom died in infancy. Thereafter, in 1727, Harry Maule entailed the estate of Ballumbie in favour of James, (who was now his eldest son,) and the heirs-male of his body; whom failing, to William; whom failing, to John; and James was thereupon infeft.

On the forfeiture of Earl James, the Countess, founding on the bond of £9000, made a claim against his estates, and it being sustained, she assigned it to James, the eldest son of Harry, and his heirs, for certain causes expressed by him and his father in a back-bond.

The forfeited estates of Panmure and Brechin having been exposed to sale, were purchased by the York Building Company, and thereafter they granted leases of the mansion-houses and parks of these properties to the Countess, for 99 years from her death; and by her they were assigned to Harry Maule, his heirs, and assignees. Thereafter, his son James having died, William, the immediate younger brother, was served heir to him, both as to the Ballumbie estate and the bond for £9000.

In this way Harry Maule was the proprietor of the estate of Kelly, and had right to the above leases; while his son William was proprietor of Ballumbie and the bond for £9000.

Thereafter, the forfeited Earl having died without issue, Harry Maule, in 1730, executed an entail of the estate of Kelly, and of the leases, in favour of his son William, and the heirs-male of his body; whom failing, to John Maule, his youngest son; whom failing, to Dr Henry Maule, Lord Bishop of Cloyne, his next heir-male and the heirs-male of his body; whom failing, to James Maule, brother of the Bishop; whom failing, his nearest heirs. On the same occasion, his son William executed an entail in the same terms, and to the same heirs, of the estate of Ballumbie, and bound himself to employ the contents of the bond for £9000 in purchasing lands to be entailed in the same way.

The Countess died in 1731, and Harry Maule in 1734. His son William was afterwards created an Irish peer, by the title of Earl of Panmure, and John was appointed a Baron of Exchequer. May 26, 1826.

The property of the parks and mansion-houses of Panmure and Brechin having been exposed to sale in 1765 and 1775, were purchased by Earl William, who continued to possess the estates on the original titles. In 1781, he executed an entail of them in his own favour, and the heirs of his body; whom failing, his nephew, the Earl of Dalhousie, in life-rent, and his second son, the Honourable Mr Ramsay Maule, in fee; whom failing, certain other substitutes. The deeds of 1730 had been placed in the custody of Baron Maule, but were never recorded, and remained latent during the life of Earl William.

On the death of Baron Maule, without issue, in 1781, these deeds were found in his repositories along with a testament bequeathing them to Lieutenant Thomas Maule. This gentleman was the grandson of Dr Maule, Bishop of Cloyne, and, failing heirs-male of Earl William, claimed right to the estates, &c. under the deeds of 1730. The Earl then brought separate actions, concluding for delivery to him of these deeds,—to have it declared that he was the unlimited proprietor of the estates, and not affected by the fetters in the entails of 1730,—and to have them reduced and set aside. His Lordship having died in the following year without issue (1782), Lieutenant Maule took out a brieve for being served, under the entails of 1730, nearest and lawful heir-male of tailzie and provision in general to him; and at the same time raised a reduction of the deed of 1781 executed by him in favour of Mr Ramsay Maule. An advocation of this brieve was brought by that gentleman, who got one for serving himself heir of tailzie and provision to the Earl, under the deed of 1781. These processes having come before the Court, and Mr Ramsay Maule, and his father, as his administrator, being sisted in place of the Earl, their Lordships, on the 1st of March 1782, 'found that the deed of tailzie, executed by the deceased 'Harry Maule of Kellie, with consent therein mentioned, in the 'year 1730, of his lands and estate of Kellie, and also the deed 'of tailzie executed by the late William Earl of Panmure, in 'the aforesaid year, of his lands and estate of Ballumbie, are 'cut off by the positive and negative prescriptions; and that the 'obligation for employing £9000 sterling, executed by the said 'William Earl of Panmure, in the aforesaid year, is cut off by 'the negative prescription; and therefore sustained the reasons 'of reduction of these three deeds, and reduced, decerned, and

May 26, 1826. 'declared accordingly: Found that the said William Earl of 'Panmure had full power to make the deed of tailzie executed 'by him, in favour of the said Mr William Ramsay Maule and 'his administrator-in-law; repelled the reasons of reduction of 'that deed of tailzie, and assoilzied the said William Ramsay 'Maule and his administrator-in-law, from the process of re-'duction-improbation and declarator, at the instance of the said 'Lieutenant Thomas Maule against them, in so far as the same 'relates to the estates of Kellie and Ballumbie, and also from 'the process against them for implement and performance of 'the prestations contained in the obligation for the £9000: 'Found that the said Mr William Ramsay Maule was entitled 'to be served heir of tailzie and provision to the said deceased 'William Earl of Panmure, his grand-uncle, in virtue of the 'foresaid deed of tailzie in his favour, and remitted to the Ma-'cers to proceed in his service accordingly, on the brieve brought 'before them by him and his administrator-in-law: Found that 'the said Lieutenant Thomas Maule had right to take up the 'lease of the house and parks of Panmure, and the house and 'parks of Brechin, and decerned against the said Mr William 'Ramsay Maule and his said administrator-in-law, in the conclu-'sions of declarator and removing in the foresaid action, at the 'instance of Lieutenant Thomas Maule, so far as respects those 'leases, and remitted to the Macers to proceed in his service in 'so far as regards these two leases; but found that he was not 'entitled to be served heir-male of tailzie and provision to the 'said William Earl of Panmure, in virtue of the said deed of 'tailzie of the estate of Kellie, executed by the said Mr Harry 'Maule, nor in virtue of the deed of tailzie of the estate of Bal-'lumbie, executed by the said William Earl of Panmure, and 'that his service on the brieve taken out by him could not pro-'ceed with regard to the said estates of Kellie and Ballumbie; 'and remitted to the Macers to dismiss the same accordingly, 'in so far as concerned these two estates.'* Against this judg-ment Mr Ramsay Maule immediately entered an appeal on the subject of the leases; but this was withdrawn, and Lieutenant Maule did not reclaim, in consequence of an arrangement enter-

* In his Appeal Case the Appellant stated, 'that the Judges, at that time, were redu-'ced by sickness and other causes, from fifteen to nine, and out of those nine only six 'voted on the question regarding the leases. Of these six, Lords Alva, Braxfield, and 'Hailes, were for Thomas Maule, and Lords Monboddo, Ankerville, and the Lord Pre-'sident (Dundas), for Mr Ramsay; but the Lord President, by an arrangement in these 'days, having no vote, when the Judges were equally divided, Thomas Maule thus 'gained the decision. Lords Gardenston, Kennet, and Westhall, were on the bench, 'and voted as to the other questions, but declined voting as to the leases.'

ed into between the parties on the 20th March 1782, stating that May 26, 1826.
'to avoid further proceedings at law, the parties have agreed to
'settle matters by arbitration. Therefore, the said George Earl
'of Dalhousie for himself, and as administrator-in-law for his
'second son, the Honourable William Ramsay Maule and his
'whole other children, and the Honourable Lieutenant-Colonel
'Malcolm Ramsay, his Lordship's brother, on the one part, and
'Thomas Maule for himself, and as administrator-in-law for
'(the Appellant) William Maule, his only son, on the other
'part, have submitted and referred, and do hereby submit to
'the amicable final decision and sentence and decreet-arbitral
'of Mr Alexander Wight and Mr Ilay Campbell, advocates, ar-
'biters mutually chosen by the said parties submitters; and, in
'case of variance between the said arbiters, to the Honourable
'Robert M'Queen, Esquire, one of the Senators of the College
'of Justice, oversman, mutually elected by the said parties, all
'questions between them, or which either of them may or can
'have with the other in relation to the premises; and particu-
'larly the whole of the said processes and claims, with the in-
'terlocutor thereon pronounced, and appeal thereon entered,
'and cross appeal competent to have been entered, both of
'which are hereby agreed to be departed from.' On the 2d
of April this award was issued: '1st, We find that the said
'leases of the house and parks of Panmure, and castle and en-
'closures of Brechin, obtained by the Countess of Panmure and
'Mr Harry Maule, from the York Buildings Company, in
'1724, are now at an end, in consequence of the late Earl of
'Panmure having purchased the property, and that the tail-
'zies of them executed in 1730, and founded on by the said
'Thomas Maule, Esq. are at any rate cut off and extinguished
'by prescription, as well as upon other grounds of law, and are
'not now subsisting deeds; and therefore, we reduce the same,
'and assoilzie the said George, Earl of Dalhousie, as liferenter,
'and the said William Ramsay Maule, his second son, as fiar
'of the estate of Panmure, and the other heirs of entail of the
'said estate, from all claim and demand upon these leases, or
'upon the tailzies thereof, at the instance of the said Thomas
'Maule, Esq. or his son, or any other persons claiming under
'those deeds in 1730, and we so far alter the interlocutor of
'the Court of Session, recited in the submission pronounced
'on the 5th of March last; but we adhere to the said interlocu-
'tor in all other points, and declare the same to be final and
'unalterable. And as we conceive it to be just and reasonable,
'that the said Thomas Maule, though not entitled to make any

May 26, 1826. 'legal claim upon the foresaid deed executed in 1730, should 'have the following provision in money settled upon him and 'his heirs undermentioned, in consideration of our having, by 'this decreet-arbitral, deprived him and them of the benefit of 'the leases, which the Court of Session had adjudged in their 'favour, we decern and ordain the said George, Earl of Dal-'housie, for himself, and as administrator-in-law for his second 'son, and taking burden as aforesaid, and his heirs and succes-'sors in general, to make payment to the said Thomas Maule, 'and his heirs under mentioned, of the sum of £3500 sterling, 'in manner and at the terms following, viz. £500 thereof to 'the said Thomas Maule himself, immediately after this decreet 'is registered, and the remaining £3000 at Whitsunday next, 'but which £3000 is then to be laid out on good and sufficient 'security, to be taken in the name of two trustees,' &c.

The instrument then provided, that Thomas Maule was to receive the interest of the money during his life, and the appellant the interest of it after his death, till the term of Whitsunday 1831, when the leases would expire, at which term the Appellant was to be paid the principal sum, and then the trust was to be at an end—but this was under the following declaration: 'And we further declare, that if either the said Thomas Maule, 'or his said son William Maule, or any other heir-male of his 'body, or subsequent heir called by the said deed in 1730, now 'reduced, shall hereafter attempt to make any claim upon the 'said deeds, or any of them, under the pretence of their not 'being bound by this submission, or on any other ground what-'ever, it shall be competent for the said George, Earl of Dal-'housie, or his said second son, or the other heirs to the estate of 'Panmure, in their order, immediately to insist for repetition 'of the trust-money, so far as the same is unuplifted at the time, 'or so far as it has been uplifted by the person making such 'claim, or by any other whom he represents, and for damages 'against the said Thomas Maule, and his heirs.'

The decree of the Court was then extracted, and the arrangement was acquiesced in by Lieutenant Maule, who died in 1789, leaving a son (the appellant) who was then sixteen years of age. In 1809, he raised an action of reduction of the service of Mr Ramsay Maule, and of the submission and award, and concluded for decree of removing from the lands of Brechin and Panmure, and count and reckoning for the rents. His reductive conclusion was in these terms:—'Therefore, and 'for other reasons to be proponed at discussing hereof, the said 'pretended submission, whole proceedings had therein, and 'decreet-arbitral pronounced therein, and general service fore-

'said, and whole grounds and warrants thereof, with all that 'has followed, or is competent to follow on the same, ought and 'should be reduced, retreated, rescinded, cassed, annulled, de- 'cerned and declared, by decreet of our said Lords, to have 'been from the beginning, and to be now, and in all time 'coming, void and null, and of no avail, force, strength, or 'effect, in so far as regards the pursuer, and not binding on 'him.' May 26, 1826.

The Court having, on the 9th March 1813, assoilzied the respondent,* and the appellant having appealed, the House of Lords, on the 10th May 1816, found, 'that in this action and 'proceeding between the present appellant and respondent, the 'alleged submission and alleged decreet-arbitral, of the respec- 'tive dates of 30th March 1782, and 2d April 1782, ought not 'to be considered as being, or having in law the effect of a sub- 'mission or decreet-arbitral, but as a form adopted, in which 'an agreement previously made between Thomas Maule, the 'appellant's father, and George, Earl of Dalhousie, parties to 'the said submission, was concluded; and with this finding, it 'is ordered, that this cause be remitted back to the Court of 'Session in Scotland, to review the interlocutor complained of 'in the said appeal, and upon such review to do therein as is 'just and consistent with this finding.'

When the case returned to the Court of Session, the respondent maintained that the right to the leases in favour of the appellant was cut off by prescription; and that, although the decreet-arbitral had been set aside by the House of Lords, it was binding as a concluded agreement or transaction. The appellant, on the other hand, contended that the discussion of the question of prescription of the leases, was not hujus loci, as it was not embraced under the summons; and that the alleged decreet-arbitral was null to every effect. The Court, however, on the 2d December 1817, held that they could competently enter upon the question of prescription, and on considering informations, and the whole circumstances of the case, they sustained the defences, and assoilzied the defender.†

The appellant again appealed, and after parties had been heard, the Lord Chancellor prepared a draft of a judgment to this effect (as the appellant alleged,)—'Reverse the interlocutor of 'the 2d December 1817, so far as it is inconsistent with the 'order of your Lordships, of the 10th May 1816, remitting the 'cause back to the Court of Session, to review the interlocutor 'of 9th March 1813, complained of in the former appeal, and

* Not reported. † See Fac. Coll. No. 139.

May 26, 1826. 'so far as it sustains generally the defences pleaded for the de-
'fender, and except as is hereinafter excepted: And order and
'adjudge, that the instrument of 2d April 1782, purporting to
'be a decreet-arbitral, ought to be set aside, and reduced as a
'decreet-arbitral, affecting any rights of the appellant; and
'declare, that under the circumstances of this case, this in-
'terlocutor, of 1st March 1782, is not to be considered as final
'and conclusive against the respondent, with respect to the
'leases in question; but their Lordships are of opinion, that
'the appellant is barred by prescription of the right to take up
'such leases, and that the defences of the respondent ought, on
'that account, to be sustained, as to so much of the appellant's
'action of reduction and declarator, as seeks a declaration of
'the rights of the appellant to such leases; and so far their
'Lordships affirm the judgment of the 2d December 1817, but
'without prejudice, as to any question between the parties,
'touching any property comprised in the deeds of tailzie, in the
'pleadings mentioned, except the said leases.'

Thereafter, the appellant submitted remarks upon this draft, and the following judgment was pronounced by the House, on the 10th of July 1819:—'It is ordered and adjudged, by the 'Lords Spiritual and Temporal in Parliament assembled, that 'the said interlocutor therein complained of be, and the same 'is hereby reversed, so far as it is inconsistent with the order of 'this House, of the 10th of May 1816, remitting the cause back 'to the Court of Session in Scotland, to review the interlocu-'tor of 6th March 1813, complained of in the former appeal, in 'so far as it sustains generally the defences pleaded for the de-'fender, and except as hereinafter expressed: And it is further 'ordered and adjudged, that the instrument of 2d April 1782, 'purporting to be a decreet-arbitral, ought to be set aside and 'reduced as a decreet-arbitral, affecting any rights of the ap-'pellant. And it is declared, that, under the circumstances of 'this case, the interlocutor of 1st March 1782 is not to be con-'sidered as final and conclusive against the respondent, with 'respect to the leases in question; and, therefore, as to so much 'of the appellant's action of reduction and declarator, as seeks 'a declaration of the rights of the appellant to such leases, it is 'further ordered and adjudged, that the said interlocutor of 'the 2d December 1817 be, and the same is hereby affirmed, 'but without prejudice as to any question between the parties 'in any other action touching any property comprised in the 'deeds of tailzie in the pleadings mentioned.'

The case having returned to the Court of Session, the judg-

ment was applied, and the interlocutor of the Court extracted on the 7th March 1820. May 26, 1826.

Thereafter the respondent raised an action to recover, and did recover from the appellant, the sum which had by the annulled decreet-arbitral been awarded.*

The appellant then raised a new action against the respondents, in which, after libelling on the deeds of entail executed in 1730, and reciting that which had been made by the Earl of Panmure, and on which the respondent possessed the estates, as also certain other previous deeds made by the Earl, he concluded to have it found, 'that the whole of the foresaid disposi-'tions and settlements executed by the said deceased William 'Earl of Panmure, whereby he conveyed the estates of Kellie 'and Ballumbie, and others, contained in the foresaid deeds of 'tailzie and obligation foresaid, were all made and granted in 'direct violation of the obligations and prohibitions, and other 'provisions and conditions therein contained, for the purpose of 'altering the order of succession, and disappointing the pursuer 'and the other substitutes called to the succession by the said 'deeds of tailzie, and the said William Earl of Panmure had no 'power to grant the same.' He therefore concluded for decree of reduction of these deeds, and of removing from the lands, and of count and reckoning; but he did not conclude for reduction of the decree in 1782. In defence, the respondent contended that the judgments already pronounced, both as to the estates and the leases, formed res judicata in his favour. The Lord Ordinary, after having appointed copies of all the judgments on which the respondent rested his plea of res judicata to be produced, found that, 'by the extracted decreet of the Court of 'Session, 5th March 1782—by the judgment of the Court of 'Session, 9th March 1813—by the judgment of the House of 'Lords, 10th May 1816—by the judgments of the Court of Ses-'sion, 21st May 1816, and 4th March and 2d December 1817 '—by the judgment of the House of Lords, 10th July 1819, and 'by the extracted decreet of the Court of Session, 7th March '1820, all right and interest which the pursuer claims under the 'present summons of reduction and declarator are totally ex-'cluded, and the subject-matter of this action is res judicata by 'the judgments above referred to, and therefore assoilzied the 'defender.'

Against this judgment the appellant reclaimed; but the Court adhered on the 1st June 1824.†

---

* See 2 Shaw and Dunlop, No. 27.

† See 2 Shaw and Dunlop, No. 26.

May 26, 1826. *Lord Hermand.*—In considering whether there is a res judicata, we must not look at each judgment separately, but at them taken all together. In this view, it is perfectly plain that the defence is well founded. Indeed, this is just a revival of the old action in 1782. The interlocutor there sustains the defence of prescription as to the lands; and were it necessary to enter on the merits, I think that judgment perfectly correct. Then there was a compromise, which was acted on for many years. At last the pursuer attempted to open up matters; but the defender was assoilzied, and the House of Lords in substance affirmed that judgment. There appears at first sight some confusion as to the lands and leases, but, on attending to the procedure, it is clear the question is at rest as to both of them.

Lord Balgray.—It is perfectly plain that there is a res judicata as to the leases. I cannot explain the judgment of the House of Lords in 1819 to any other effect. As to the lands, I am not so clear. Perhaps the pursuer may be entitled to get at them in proper form. The House of Lords have set aside the submission in toto; and it may, perhaps, still be competent to reduce the judgment in 1782. But it is not before us, and while it stands, it must form a res judicata against the pursuer as to the lands.

Lord Gillies.—We have nothing to do with the merits. The only point brought under our review is that of res judicata. With regard to the lands, there is an extracted decree in favour of the defender, and which affords to him a valid defence. Possibly it may be affected by the submission being set aside; but no reduction of it has been brought, and therefore it must receive full effect. The decree-arbitral has, however, only been set aside as such. The claim to the leases is not touched by the reservation in the judgment of the House of Lords; and it is plain, when you look back at all the judgments, in a complex view, there is a res judicata also as to them.

Lord Succoth.—I am of the same opinion.

Lord President.—I concur. The decree-arbitral, settling the rights of the parties, both as to the lands and leases, was acquiesced in till 1809. Then a reduction was brought of it as a decree-arbitral, but not as an agreement, and the judgment of 1782 was not complained of. The House of Lords have set aside the decree-arbitral as such, but not as an agreement; and indeed it would have been ultra petita to have done so. This Court assoilzied from the action, and that judgment has been affirmed, except to the effect of finding that the decree-arbitral is not valid as such. Therefore, the absolvitor from the claim to

the leases remains effectual, and the decree of 1782 is a bar as to that for the lands. May 26, 1826.

William Maule appealed.

Appellant.—By the judgment of 1782, the claim to Kellie, Ballumbie, and the £9000, was rejected—to the leases the claim was sustained. The operation of this decree was stayed by the award under the agreement. This agreement and award, and nothing else, the appellant challenged in his former action; and the award has been reduced to all effects. The conclusion as to removing was not equivalent to a claim, on the merits, to the leases, or such as would have warranted a decree or decerniture on the merits. But it was necessary in point of form, as, in consequence of the award, the respondent had entered into possession; and it was requisite that matters should be put exactly as if no such decree had been pronounced, so as to give effect to the appellant's rights under the judgment of 1782. While, however, the House of Lords set aside the decree-arbitral, they thought, that under the circumstances of the case, the finding in the judgment 1782, as to the leases, ought not to be final against the respondent. But in so setting aside the decree, matters were laid open to both parties, and it became competent to the appellant to proceed in any other action to vindicate his rights. All that was, therefore, decided by the House was, that the decree-arbitral was ineffectual, and that the door was still open to the respondent to claim the leases, and of course to the appellant to claim the estates of Kellie and Ballumbie, and the bond of £9000. It is impossible, therefore, to contend that the judgments subsequent to that of 1782 afford a plea of res judicata; and as to that judgment, it has in effect been entirely laid open by the proceedings which have taken place.

Respondent.—The conclusions of the appellant's action were perfectly sufficient for trying the question of right to the leases; and accordingly that very point was discussed before the Court of Session, and was set at rest by the judgment of the House of Lords, in 1819. There was then no discussion as to the estate of Kellie, Ballumbie, or the £9000; and therefore the reservation could not apply to them. The right to these estates had long since been settled by the extracted decree in 1782. The appellant's plea in the Court of Session was, not that the conclusions of his action would not admit an inquiry into the merits of the claim to the leases, but that his right to the leases was finally fixed by the judgment 1782. Looking at the judg-

May 26, 1826. ments pronounced in this litigation, taken altogether, it is impossible to get over the respondent's defence of res judicata.

The House of Lords ordered and adjudged, 'That the interlocutors complained of in the said appeal be, and the same are 'hereby affirmed, with respect to the estates of Kellie and Ballumbie, and the bond for £9000 in the said interlocutors mentioned, so far as the said interlocutors find that all right and 'interest in the said estates and bond which the appellant claimed under the summons of reduction and declarator, in the said 'interlocutors mentioned, were totally excluded, and the subject matter of the action then before the Court as to such 'estates and bond was res judicata by the judgment contained 'in the decreet of the Court of Session of the 5th of March '1782 in the said interlocutors mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator, in the 'said interlocutors mentioned, to impeach such decreet of the '5th of March 1782, so far as the same respected such estates 'and bond, and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent 'to impeach the same: And it is further ordered and adjudged, 'That the interlocutors complained of be, and the same are 'hereby reversed, so far as the same find that all right and interest which the appellant claims in the leases of Brechin and 'Panmure, under the summons of reduction and declarator, in 'the said interlocutors mentioned, were totally excluded, and 'that the subject-matter of the action then in question, touching such leases, was res judicata by all the several judgments 'referred to in the interlocutors complained of, inasmuch as the 'said decreet of the Court of Session of the 5th of March 1782, 'instead of excluding, expressly affirmed the title under which 'the appellant claimed such leases, and the judgment of this 'House of the 10th of July 1819, in the said interlocutors mentioned, expressly left all questions open to both parties with 'respect to the said leases, notwithstanding such judgment, or 'any of the proceedings in the Court of Session to which such 'judgment referred, such judgment of this House having declared, that under the circumstances of the case the said decreet of the 5th of March 1782 was not to be considered as 'final and conclusive against the respondent with respect to 'such leases; and having, therefore, as to so much of the appellant's action of declaration and reduction then before the

'House as sought a declaration of the rights of the appellant to 'such leases, founded on the said decreet of the 5th of March '1782, affirmed the interlocutor of the 2d of December 1817, 'then complained of, but having also expressly declared that 'the affirmance of such interlocutor by this House was without 'prejudice to any question between the parties in any other 'action touching any property comprised in the deeds of tailzie 'therein mentioned; the intent and meaning of the whole of 'such judgment being to leave all questions respecting the right 'to the said leases, as well as to the rest of the property com- 'prised in the deeds of tailzie therein mentioned, open to be dis- 'cussed in such manner as the same might be properly discuss- 'ed in any future proceeding properly instituted for that pur- 'pose: But, as it appears that the Court of Session, in pronoun- 'cing the interlocutors complained of, have not entered into 'any question touching the right to the said leases, except the 'question, whether, by the several judgments in the said inter- 'locutors mentioned, all right and interest, which the appellant 'claimed under the summons of reduction and declarator then 'before the Court, were totally excluded; and whether, there- 'fore, the subject-matter of that action respecting such leases 'was res judicata by the judgments referred to in such interlo- 'cutors, so that the right of the appellant to the benefit of such 'leases has not been properly discussed in the action of reduc- 'tion and declarator then before the said Court, according to 'the reservation contained in the judgment of this House of the '10th of July 1819, and the true intent and meaning of that 'judgment: It is further ordered, That this cause be referred 'back to the Court of Session, so far as the same respects the 'right and title to the said leases; and that the said Court do 'proceed therein in such manner as shall be consistent with this 'judgment, and with the former judgments of this House, and 'as shall be just.' May 26, 1828.

LORD GIFFORD.—My Lords, there was a case heard before your Lordships, a short time ago, in which your Lordships had the assistance of a noble and learned lord (Lord Redesdale), who is not now present, but with whose opinion I have had the benefit of being made acquainted; I mean the case of Maule *v.* Maule. My Lords, I think I shall be enabled, very shortly, to state to your Lordships the nature of the question which has been brought before you for judgment, though that question arises out of a very complicated state of facts, and a long series of litigation, commencing so long ago as the year 1782.

The present appellant's father, Mr Thomas Maule, claimed to be en-

May 26, 1826. titled, under old entails, to estates, called Ballumbie and Kellie. He claimed, also, to be entitled to a bond for £9000, given by James Earl of Panmure to his countess; and he claimed, also, to be entitled to the benefit of certain leases of lands, called Brechin and Panmure. In the year 1782, various actions were pending between him and the other parties, who contended that his claim under those entails had been cut off by the Scotch law of prescription, and that they were entitled to the estates; and, my Lords, these actions being conjoined, a judgment was pronounced on the 5th of March 1782, to which it is necessary to call your Lordships' attention. (His Lordship then read the judgment.)

My Lords, it is stated that Mr Ramsay Maule being dissatisfied with this interlocutor, and to avoid farther litigation between these parties, an agreement was entered into on the 30th of March 1782, to settle all matters by arbitration. The arbitrators were, Mr Alexander Wight, a very learned counsel in the Courts of Scotland, Mr Ilay Campbell, afterwards Sir Ilay Campbell. There was an instrument, prepared in the common form of such instruments in Scotland, which, after the usual preamble, proceeded as follows. (His Lordship here read the terms of it.)

These gentlemen made what is termed, but what has since been found not to be regular, a decreet-arbitral. (His Lordship then read the decreet.) Thus your Lordships see that, in fact, their decision was wholly against the appellant's father, for they adhered to the interlocutor of the Court in so far as it had established the right to the estates of Kellie and Ballumbie, and the £9000; and they altered the interlocutor of the Court of Session, with respect to Lieutenant Maule being entitled to the leases.

My Lords, whether this instrument was entitled to the character of a decreet-arbitral, or not, is of no importance to inquire, after what I shall state to your Lordships relative to the proceedings which have passed, and particularly after the decision in your Lordships' house. It was acquiesced in by Mr Thomas Maule till his death. His son, the present appellant, upon his death, did not take any step to impeach this proceeding, until, I think, the year 1809. The appellant's father died in November 1789. In the year 1809, an action was brought in the Court of Session for the purpose of setting aside this decreet-arbitral, as far as affected the leases, because, by so doing, the appellant thought that he would set up the judgment in the Court of Session in favour of his father. In that action he was unsuccessful in the Court below, but upon an appeal to your Lordships' house, your Lordships, in the month of May 1816, pronounced this interlocutor; you 'find that in this action, and proceeding be-'tween the present appellant and respondent, the alleged submission and 'the alleged decreet-arbitral, of the respective dates of the 30th of March '1782 and 2d of April 1782, ought not to be considered as being or bear-'ing in law the effect of a submission, or decreet-arbitral, but as a form 'adopted, in which an agreement previously made between Thomas 'Maule, the appellant's father, and George Earl of Dalhousie, parties to 'the submission, was concluded;' and with that finding your Lordships

ordered the cause 'to be remitted back to the Court of Session in Scot- May 26, 1826.
'land, to review the interlocutor complained of in the appeal, and upon 'such review to do therein as is just and consistent with this finding.' Your Lordships, therefore, perceive that the House determined that this instrument was not to have the effect of a decreet-arbitral.

Upon its going back to the Court of Session, various proceedings were had there; and the cause came back to your Lordships' House by a second appeal; the Court of Session having sustained the defences pleaded for the defender, assoilzied him, and decerned. I should have observed, that there was a most elaborate discussion of the question agitated in 1782, as it regarded the leases only. The object of the action was merely to set aside the decreet-arbitral. It contained no other conclusion in the summons, but that the decreet-arbitral should be set aside, as a decreet-arbitral, and, accordingly, your Lordships have declared it was merely a form adopted, in which a previous agreement was concluded. My Lords, on the case coming before your Lordships' House a second time, an interlocutor was pronounced, to which it is most important to call your Lordships' attention, because it does appear to me, as it has appeared to the noble and learned Lord to whom I have referred, who heard this case, that the Court of Session have not accurately considered the import of that decision of your Lordships' House. It was ordered on the 10th July 1819, that 'the interlocutor therein complained of be, and the same is 'hereby reversed, so far as it is inconsistent with the order of this House, 'of the 10th May 1816, remitting the cause back to the Court of Ses-'sion in Scotland, to review the interlocutor of the 6th of March 1813, 'complained of in the former appeal, in so far as it sustains generally the 'defences pleaded for the defender, and except as hereinafter excepted.'

My Lords, one of the defences was that the decreet-arbitral was binding on the parties. Your Lordships had determined it had not that effect. Then the judgment goes on to say, 'that the instrument of the 2d of 'April 1782, purporting to be a decreet-arbitral, ought to be set aside and 'reduced as a decreet-arbitral affecting any rights of the appellant, and it 'is declared that under the circumstances of this case, the interlocutor 'of the 1st of March 1782,'—the interlocutor to which I have called your Lordships' attention,—'is not to be considered as final and conclusive 'against the respondent with respect to the leases in question; and there-'fore, as to so much of the appellant's action of reduction and declara-'tor as seeks a declaration of the right of the appellant to such leases, it 'is further ordered and adjudged that the said interlocutor of the 2d of 'December 1817 be, and the same is hereby affirmed, but without pre-'judice as to any question between the parties in any other action touch-'ing any property comprised in the deed of tailzie in the pleadings men-'tioned.'

In consequence of this decision the appellant states in his Case, that he regarded this judgment as not final against his claim to the leases:—I mean, my Lords, particularly the question of prescription, upon which the arbitrators found that his ancestors had been barred. He likewise considered whether he could not, in some way or other, call in question

May 26, 1828. the decision of the Court of Session, with respect to the estates of Kellie and Ballumbie, and the £9000; and he says, he considered whether he could now appeal against that decision; or, whether he could get that decision reviewed by the Court of Session,—but at last he determined to institute a new and substantive action, founded upon his claims, not only on the estates of Kellie and Ballumbie, but on the leases of Panmure and Brechin, and on the bond for £9000; and accordingly he instituted an action of declarator, and which is the action upon which the present appeal is brought.

My Lords, when that action came before the Lord Ordinary, the appellant was met by several defences,—first, that all the parties having interest were not called,—next, that the subject-matter of the action was res judicata, in all points, by the judgments of the Court of Session, from the first of March 1782; that the principle of that judgment was confirmed by a late judgment of the House of Lords, with regard to the leases of Brechin and Panmure; and as to the said leases, there was a separate res judicata, by the judgment of the House of Lords, dated the 10th July 1819; that there was no action of reduction of the decreet of the Court of Session, and that therefore the present action was totally incompetent. Then the third defence was, that the claimant in his present action was cut off by prescription, both positive and negative, even if there were any room for entering into the merits of the case.

Upon the case being debated before the Lord Ordinary, he first appointed the defenders to produce copies of all the judgments on which they founded the plea of res judicata;—the case came on before the Lord Ordinary afterwards, who pronounced the following interlocutor: 'The 'Lord Ordinary having considered the memorials for the parties and 'whole process, finds that by the extracted decreet of the Court of Session 'of the 5th March 1782, by the judgment of the Court of Session of the '9th March 1813, by the judgment of the House of Lords of the 10th 'May 1816, by the judgments of the Court of Session of the 21st May '1816, and the 4th of March and the 2d of December 1817, by the 'judgment of the House of Lords of the 10th May 1819, and by the ex-'tracted decree of the Court of Session of the 7th March 1820, all right 'and interest which the pursuer claims under the present summons of re-'duction and declarator are totally excluded, and the subject-matter is 'res judicata, by the judgments above referred to; therefore assoilzies the 'defenders from this action, and decerns.'

My Lords, that judgment was brought under the review of the Court of Session, who affirmed this interlocutor of the Lord Ordinary; and those matters have now been brought again before your Lordships for your opinion.

My Lords, with respect to the decision of the year 1782, relative to the estates of Kellie and Ballumbie, the leases of the estates of Panmure and Brechin, and the bond for £9000, it does appear to me, and also to the noble and learned Lord to whom I have referred, that in the present action that decision may be considered as res judicata. It has not been appealed against, nor reviewed, and I apprehend, it has not been touched by

any decision of the House of Lords relative to the leases. Whether the present appellant can by any measure get rid of that judgment, is not for your Lordships to decide. The present is a substantive action, for the purpose of establishing the right to this property. That decision in the year 1782 does appear to me to be a res judicata; but I do not apprehend the subsequent judgments, which are mentioned in the Lord Ordinary's interlocutor, have anything to do so as to affect the claim to the leases; but with respect to the Kellie and Ballumbie estates, and the £9000, that judgment in the year 1782 does appear to me to constitute a res judicata against the appellant as to those subjects. May 26, 1826.

With regard to the leases, the respondents say that the decision of your Lordships' House in the year 1819 is res judicata as to them in all points. Now, my Lords, looking at the action in which that judgment was pronounced, and looking at the very cautious terms in which your Lordships' judgment was couched—the very guarded terms in which that judgment was expressed; it appears to me that it was the express intention of your Lordships to do nothing more than reduce the decreet-arbitral. For your Lordships will observe, the judgment states that, 'as to 'so much of the appellant's action of reduction and declarator, as seeks a 'declaration of the rights of the appellant to such leases, it is further or-'dered and adjudged, that the interlocutor of the 2d of December 1817 'be, and the same is hereby affirmed, but without prejudice as to any 'question between the parties in any other action, touching any property 'comprised in the deeds of tailzie in the pleadings mentioned.' It has been considered below, that in as much as in the course of that action, which was brought before your Lordships in the year 1819, not only the effect of that decreet-arbitral was discussed, but incidentally other questions were raised in the papers, with respect to the right of the present appellant to those leases, they were to be considered as absolutely decided; but I apprehend, that looking at the foundation of that action, and the conclusion of the summons, and still more, looking at your Lordships' judgment, it is clear you did not mean by that judgment to prejudge any of those questions, which were not strictly before your Lordships or the Court below. But your Lordships have gone on further to state, that the interlocutor of 1782 is not to be considered as final and conclusive against the respondents, with respect to the leases in question. Your Lordships have expressly declared, that with regard to that finding of the Court of Session in 1782, it is not to be considered as final against them. Your Lordships have by this judgment left the other questions open,—the question of prescription, or other questions affecting the claim of the appellant,—the effect of your judgment being to disaffirm the operation of the decreet-arbitral. My Lords, this being the view we have taken of the case, a judgment has been prepared, which I shall use the liberty of reading to your Lordships, for the purpose of carrying into effect the view which I have thus endeavoured to present to your Lordships,—to affirm the interlocutors complained of in the said appeal; and the same are hereby affirmed, with respect to the estates of Kellie and Ballumbie, and the bond for £9000, in the said interlocutors mentioned, so far as the said

May 26, 1826. interlocutors find that all right and interest in the said estates and bond, which the appellant claimed under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and the subject-matter of the action then before the Court, as to such estates and bond, was res judicata, by the judgment contained in the decreet of the Court of Session of the 5th March 1782, in the said interlocutor mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decreet of the 5th March 1782, so far as the same respected such estates and bond; and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same. And then, my Lords, with respect to other parts of the interlocutors complained of, that they be, and are hereby reversed, so far as the same find that all right and interest which the appellant claims in the leases of Brechin and Panmure, under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and that the subject-matter of the action then in question touching such leases, was res judicata. And then, my Lords, the judgment goes on to state the substance of your Lordships' judgment in this House,—that the Court of Session may see distinctly the ground on which your Lordships reverse that interlocutor, the substance being with respect to the leases, however unfortunate it is, that the cause should be continued, that the case must be reviewed, and that the Court of Session proceed further in respect of the leases, and the other defences, as to them shall seem meet; it being clear that the only effect of your Lordships' judgment in 1819, was to shut out the effect of the decreet arbitral.

A. FRASER—J. CAMPBELL, *Solicitors.*

No. 35. THE OFFICERS OF STATE, Appellants.—*Sol.-Gen. Wetherell—Miller.*

THE EARL OF HADDINGTON, Respondent.—*Shadwell—Robertson.*

et e contra.

King's Park—Clause—Prescription.—Held (affirming the judgment of the Court of Session) that a Charter granting the Office of Keeper of the King's Park did not confer any feudal right to the property of it, although it was alleged, that acts of proprietorship had been exercised by the Keeper for more than forty years; but a remit made to review and take the opinion of the other Division of the Court, as to whether the Keeper of the Park be entitled, under the terms of the grant and alleged possession for more than forty years, to work quarries in the Park?

May 26, 1826. 2D DIVISION. Lord Pitmilly. THE Palace of Holyroodhouse, in the immediate vicinity of Edinburgh, has attached to it a Royal Park, in which are situated the hills, or rising grounds, called Arthur's Seat and Salis-

bury Crags. Prior to 1646, it does not appear that there was any hereditary keeper of the Park, the Palace having been, till the time of James VI., the usual place of residence of the Kings of Scotland, and the Park being under the immediate care of the household officers. In that year, however, Charles I. granted to Sir James Hamilton, and his heirs-male, a royal charter, by which he constituted them 'hereditarios custodes Roborarii 'nostri lie Park de Holyroodhous omniumque partium et pendi-'culorum ejus ad eund. pertinen.'; and the grant proceeds— 'Ac dedisse tenoreq. pntis carte nre dare dict. Dno Jacobo Ha-'miltoun, eiusq. prescript. hereditariu. officium et custodiam 'dict. nri Roborarii, cum omnibus feodis casualitatibus devoriis 'et privilegiis quibuscunq. ad eund. pertinen. cum plena ptate 'prefato Dno Jacobo suisq. predict. faciendi et constituendi sub-'custodes dict. Roborarii unum vel plures pro eorum arbitrio 'proq. eorum officio exercendo. Nos cum avisamento et con-'sensu predilecti nri consanguinei et consiliarii nri Therarii 'regni nri Scotiæ, et Dni Jacobi Carmichael nri Therarii depu-'tati, dedimus, concessimus, assignavimus, tenoreq. pntis carte 'nre damus concedimus et assignamus præfato Dno Jacobo 'Hamiltoun ejusq. prescript. heredie. particularia feoda et om-'nes devorias ad eund. spectan. cum ptate prefato Dno Jacobo 'Hamiltoun eiusq. prescript. semetipsos aut alios eorum nobus 'haben. eoru. warrantam levandi predict. feoda, casualitates, et 'devorias quascunq. ad dict. Roborarium spectan. omne tpre fu-'turo, ac pro omnibus annis preteritis debitis et nondu. per-'solut,' &c. Then there is this clause: 'Inhibendo omnes 'nros subditos, ne directe aut indirecte sub quocunq. pretextu 'possessionis tituli aut juris presumant imiscere semetipsos 'dict. Roborario aut cu——ad eund. pertinen. quocunq. tem-'pore futuro absq. licentia et jure, a dicto. Dno Jacobo Hamil-'toun eiusq. prescript. ad id prius obtent. prout illi eorum sumo 'periculo, in contrarium respondere voluerint,' &c. There is also a clause in these terms: 'Mandamus tenoreq. pntis carte 'nre Dominis nri Concilii et Sessionis ut lras dict. Dno Jacobo 'Hamiltoun eiusq. prescript. in hunc effectu. dent et dirigant 'ac nos pro nobis et nris successoribus volumus concedimus et 'ordinamus quod unica sasina nunc per dict. Dnum Jacobum 'Hamiltoun perq. eius prescript. in futurum, apud dict. Robo-'rariu. lie Park capienda sufficiens erit ijs sasina, pro prædict. 'hereditario officio custodie dict. Roborarii cum viridariis et ca-'sualitatibus ad eund. pertinen.' &c. Then follows the Tenendas clause: 'Tenen. et Habend. predict. hereditarium officium 'custodie, dict. Roborarii cu. anuis feodis et casualitatibus ad

May 26, 1826.

May 26, 1820. 'eund. pertinen. prefato Dno. Jacobo Hamiltoun, eiusq. pre-
'script, de nobis et successoribus nris in libera alba firma,
'feodo et hereditate in perpetuum, per omnes rectas metas suas
'prout jacent in longitudine et latitudine cum libero introitu et
'exitu, cumq. omnibus et singulis libertatibus commoditatibus
'proficuis asiamentis ac justis suis pertinent. quibuscunq. tam
'non nominat. qua. nominat, tam subtus tra qm. supra tram
'procul et prope ad dict. officium spectan. seu juste spectare
'valen. quomodo libet in futuru. libere quiete, plenarie integre,
'honorofice, bene et in pace, sine aliquo impedimento, revoca-
'tione, contradictione, aut obstaculo aliquali; Reddendo inde
'annuatim prefatus Dns. Jacobus Hamiltoun eiusq. prescript.
'nobis et succoribus nrs unu. denariu. usualis monete regni
'nri Scotie ad festum Pentecostes nomine albe firme, si petatur
'tantum.'

In 1690, Thomas, Earl of Haddington, acquired right to this office, by adjudication from the family of Hamiltons; and thereafter obtained from William and Mary a crown charter, destining the office to the heirs of entail of the honours and estates of Haddington. The grant bears to be—'Predilecto 'nostro consanguineo Thome Comiti de Hadingtoune, Domino 'Binning et Byres, et hæredibus masculis de corpore suo legit-'time procreand; quibus deficien. aliis suis hæredibus tallie 'et provisionis in juribus et infeofamentis suis comitatus et sta-'tus de Hadingtoune, content. ejusque assignatis quibuscum-'que hæreditarie et irredimabiliter, totum et integrum hære-'ditarium officium et custodium Roborarii nostri lie Park de 'Halyrudhouse, cum omnibus redditibus proficuis, divoriis, vi-'ridariis, feodis, casualitatibus, privilegiis, et emolumentis qui-'buscunque, ad idem spectan. et pertinen, cum potestate admit-'tendi et constituendi, etiam expellandi subcostodes, unum vel 'plures, in dict. Roborario, pro dict. Comitis de Hadingtoune, 'ejusque prædict. eorum arbitrio Ac etiam cum plena potestate 'levand. et recipiend. annuos et terminos reditus, proficua et 'divorias ad id pertinen. omni tempore futuro, jacen. infra, 'vicecomitatum nrum de Edinburgh.' Then there is this clause: 'Quodquidem totum et integrum dict. hæreditarium officium 'et custodia dict. Roborarii lie Park de Halyrudhouse, cum in-'tegris proficuis privilegiis et casualitatibus id idem pertinen. 'ad Dominum Jacobum Hamiltoun, militem, filium et hære-'dem deservit. et retornat. quend. Jacobi Hamiltoune de Priest-'field, perprius hæreditarie pertinuerunt. tent. per illum, de 'nobis nostrisque successoribus tanquam ejusdem legitimis su-'perioribus, et quæ per ipsum ejusque legitimos procuratores,

'ejus nomine ad hunc effectum specialiter constitut. et patentes May 26, 1826.
'literas, in manibus dict." &c.—" Et volumus et concedimus
'proque nobis et successoribus nostris, decernimus et ordina-
'mus, quod unica sasina per traditionem terræ et lapidis solum-
'modo nunc per præfat. Thomam, Comitem de Hadingtoune,
'perque ejus prædict. omni tempore futuro super solo cujusvis
'parti sdict. Roborarii lie Park de Halyrudhouse, capiend. sta-
'bit valida et sufficiens erit iis sasina, pro toto et integro, præ-
'dict. hæreditario officio et custodia dict. Roborarii, cum inte-
'gris redditibus, proficuis, privilegiis, et casualitatibus, ad id.
'pertinen. et spectan, quocirca, et cum omnibus quæ inde sequi
'poterint, nos pro nobis et successoribus nostris, cum avisa-
'mento et consensu prædict. dispensavimus tenoreq. pntis cartæ
'nostræ dispensamus in perpetuum, tenend. et habend. totum
'et integrum prædict. hæreditarium officium et custodiam dict.
'Roborarij de Halyrudhouse, cum omnibus et singulis inte-
'gris redditibus, proficuis, divorijs, viridarijs feodis casuali-
'tatibus, privilegijs et immunitatibus quibuscunque ad idem
'pertinen. et spectan. particulariter et generaliter supra men-
'tionat. jacen. modo predict. præfato Thomæ, Comiti de Ha-
'dingtoune, et hæredibus masculis, tallise et provisionis, et as-
'signat. prædict. de nobis et successoribus nostris, in libera
'alba firma, feodo, et hæreditate, in perpetuum, per omnes rec-
'tas metas suas,' &c.

On this charter the Earl took infeftment, and the office now belonged to the present Earl of Haddington.

Salisbury Crags form a bold and precipitous line of rocks, and, being in the immediate neighbourhood of the Palace, add greatly to its ornament and amenity. The rock is of a nature well adapted for paving streets and forming roads; and quarries having been made in them to a large extent, under leases granted by the Earl of Haddington to the Magistrates of Edinburgh, and to certain road trustees, the Officers of State raised an action against the Earl, bearing, 'that the said office of 'keeper and ranger, which the said Charles Earl of Hadding-'ton enjoys, although it may give right to the annual profits 'of the said Park, vest in him no right to the property itself— 'that remains with us, and our royal successors, and of which 'there has been no grant, or deed of alienation, in favour of 'the said Earl, or his predecessors in the said office; he and 'they being bound to administer the same salva substantia, and 'not entitled to exhaust, or dilapidate, or alienate, either par-'tially or totally, the property itself, by operations of any sort:

May 26, 1826. 'That notwithstanding this clear and distinct grant, the said 'Charles, Earl of Haddington, and others deriving, or pretending to have authority from him, have thought proper, without 'any right or title whatever, to exhaust and dilapidate the property of the said Park, by opening quarries, and working the 'same to a great extent, by which operations the property of the 'said Park is materially hurt and deteriorated.' The summons then concludes, that it should be declared, that 'the said Charles, 'Earl of Haddington, and his successors in the office of keeper 'and ranger of our said Park of Holyroodhouse, have no right of 'feudal property thereto, and no right or title to work quarries, 'or to do or authorise any act or operation by which the property of the said Park may be in any wise dilapidated or exhausted;' and therefore ought to be decerned and ordained 'to cease and give up working the said quarries, and to desist, 'in all time coming, from doing any act or operations by which 'the property of the said Park may be in any ways injured, dilapidated, exhausted, or deteriorated.'

In defence, the Earl pleaded, 1. That although he had no feudal right in the property of the soil, yet he held a feudal grant, conveying to him the office, with all the emoluments arising out of the Park; that quarries had, prior to its date, been worked as a source of profit; and that therefore he, by virtue of this grant, was entitled to continue these workings so as to derive these emoluments; and, 2. That his titles, with a possession for nearly 200 years, gave him an absolute right to work these quarries, by virtue of the positive prescription.

On the other hand, it was contended by the Officers of State, 1. That although it may be true that the Crown, as absolute proprietor of the Crags, might have permitted quarries to be made, and the rock to be carried away, yet, as the Earl was merely the keeper, or preserver of the Park, and had no right of property, he could not lawfully so far invert the nature of his office as to destroy and carry away that which was intrusted to his safe keeping; 2. That such a title could never give a right of property by the longer possession, and therefore there were no termini habiles for the plea of prescription; and, 3. That, in point of fact, there had not been that possession which was necessary to prescription.

The Lord Ordinary found it instructed, 'That, prior to the 'date of the original grant in 1646, stone quarries were wrought 'in the Park of Holyroodhouse, and emoluments were derived 'from them. And in respect, the said original grant, and renewed grants, in favour of the defender's predecessors, confer

'the office of keeper of the Park, and along therewith all the 'profits and emoluments of the Park, finds, that with reference 'to the usage anterior to the grant, the terms of the conveyance 'import a right in the grantees of working the quarries in ques- 'tion, and this independently of the clause of tenendas, which, 'although it make reference to minerals, would not be effectual 'to convey any subject, which was not either in express terms, 'or by legal construction, carried by the dispositive clause: 'Finds, that the construction now put on the terms of the grant 'is confirmed by the usage that has taken place since its date; 'and, separatim, finds, that such being the import of the grant, 'the defender's right to the quarries is established by the posi- 'tive prescription. On these grounds sustains the defences, as- 'soilzies the defender, and decerns.' May 26, 1826.

Against this interlocutor the Officers of State reclaimed; but the Court, 'in respect no abuse is alleged to have been com- 'mitted,' adhered. The Officers of State then presented a second petition, and alleged, that there had been great abuse; that, in particular, during the four years subsequent to 1815, between 46,000 and 60,000 tons of the rock were carried away, being about 12,000 tons annually; and that, in the operation of quarrying, there had not been less than 36,000 tons excavated each year, being about 100 tons a-day. The Court, on the 24th June 1823, on advising the petition with answers, found, 'that the defender has no feudal right of property to the 'Park of Holyrood-house, but quoad ultra adhered.' *

Lord Craigie.—If this question had arisen in the course of the first year after the date of the grant, I do not think Lord Haddington could have maintained the plea he now does. The tenendas clause merely states the subjects over which his duty of keeper extends; but if it appeared that there were certain profits attached to his office, he would have right to them. Such an office, however, could never confer on him a right of property in the ground itself. It is similar to an irrevocable power of factory, which no length of possession could ever convert into a title of property: Therefore, there is here no title to found prescription; and even if there was, I doubt whether the possession be sufficient.

Lord Glenlee.—I see no reason to alter the interlocutor. If it be supposed to sanction the idea of Lord Haddington having a feudal title, I think it should be varied to that effect, and a

* See 2 Shaw and Dunlop, No. 397.

May 26, 1826. finding inserted that he has no such title. The interlocutor, however, only imports, that Lord Haddington has been accustomed to work the quarries as part of the profits of his office, and is entitled to do so, if he do not go too far. It is therefore open to the Crown to show that there is an abuse; but this has not yet been done satisfactorily.

Lord Robertson.—It is quite clear that Lord Haddington has no feudal title; but his charter conveys to him all the profits and emoluments of the park. If the Officers of State could point out precisely what these are, and that they do not include those claimed by Lord Haddington, then he might be restricted to them. But, in absence of any such specification, we must look to possession as explanatory of his rights; and from that we see evidence of his having drawn emoluments from the quarries for a long period without objection.

Lord Bannatyne.—I think the interlocutor ought to be altered. It no doubt appears, that, prior to the grant, the quarries were worked to a limited extent; but the grant, if it had the effect to give right to work these quarries, could not exceed the profits formerly acquired from that source.

Lord Justice-Clerk.—I think the interlocutor right. Undoubtedly Lord Haddington has no right to the property; but there is a broad and sweeping grant to him, of all the profits and emoluments attached to the office, and which are derivable either from above or below ground. At its date, quarries were worked, and profit thence derived; and possession has followed on this for a great length of time. We may find that he has no feudal title; but in other respects the interlocutor is right.

Both parties appealed.

Appellants (*Officers of State.*)—An abuse by the respondent in the exercise of this right was distinctly alleged, and is repeated. But if the respondent has a prescriptive right to work the quarries, it was a manifest inconsistency in the Court to qualify the interlocutor by the limitation, of 'no abuse alleged.' The heritable right acquired by the respondent, is not of the soil, or the profits of the soil, but of the office, and profits of the office; and that right does not authorise him to destroy the very subject of which he is the keeper and custodier. There being no original right to the solum, prescription cannot avail the respondent. There is no title on which to prescribe. The workings alleged to have taken place, arose from consuetudinary privileges, and not through grants by the keepers. Until 1814, when the ravages

began, there had been, for the sixty years previous, no leases by the Haddington family, under which quarries were worked. May 26, 1826.

Respondent (Earl of Haddington.)—The titles founded on, convey to the respondent the right now challenged. His predecessors enjoyed it in its fullest latitude, and he is entitled to continue the same enjoyment. If it were possible to entertain a doubt as to the force and effect of these titles, the long possession which has followed would show what the interpretation ought to be. Besides, a complete title has been obtained by prescription. There has been no abuse, and the respondent never pretended that, in the proper and strict sense of the word, he had a feudal right to the property of which he holds the office of hereditary keeper. But still his titles warranted him in doing that which he and his predecessors have for centuries done.

The House of Lords ordered and adjudged, 'that so much of 'the interlocutor of 24th June 1823, complained of in the said 'appeal, as finds that the defender has no feudal right of pro- 'perty in the Park of Holyroodhouse, be, and the same is here- 'by affirmed: And it is further ordered, that as to the remain- 'der of the said interlocutor, and as to the other interlocutors 'complained of in the said appeal, the cause be remitted back 'to the Court of Session in Scotland, to review the same: And 'it is further ordered, that the Court, to which the said remit 'is made, do require the opinion of the other Judges of the 'Court of Session in writing, upon the questions of law which 'occur in the same; which opinion the said Judges are required 'to give; and after such review, the said Court do decern in 'the said cause as may be just.'

Lord Gifford.—My Lords, This is a case in which the Officers of State in Scotland are the appellants, and the Earl of Haddington is the respondent, which has been brought by appeal before your Lordships. The question in this case is, whether the Earl of Haddington, who is, it appears, hereditary-keeper of the King's Park of Holyrood-House, near Edinburgh, has a right in that character to work and carry away and dispose of the rocks and minerals which that Park contains, without the consent of the Crown, in whom the feudal property is still vested.

My Lords, it appears that under very ancient grants of this office—the earliest in the year 1646—the Crown, by a charter in that year, granted the office of custodier of this Park to Sir James Hamilton and his heirs. Afterward this office was acquired by an ancestor of the present Earl of Haddington, who, in the year 1691, obtained a charter of resignation from the Crown. By virtue of this grant, this office has remained in the

May 26, 1826. Earl of Haddington, and the ancestors of the present Earl of Haddington. It appears, my Lords, that in this Park are certain rocks, called Salisbury Crags, which are very near the city of Edinburgh, and which contain quarries of stone; and that the Earl of Haddington claiming a right to work these quarries in respect of his office of hereditary keeper, has for several years past, and particularly from the year 1814, been working these quarries to a very considerable extent. In consequence of his so working them, the attention of the Officers of State, who are bound to protect the interests of his Majesty in Scotland, being called to the subject, they, in the year 1819, instituted an action of declarator against the Earl of Haddington, by which they sought to have it declared. (His Lordship here read the conclusion of the summons.)

My Lords, to this action defences were lodged on the part of the Earl of Haddington, in which he stated that those quarries had been worked from time immemorial, or at least before the time of the earliest grant in the year 1646; and that he having a right to all the casualties, emoluments, and advantages of the Park, was entitled to continue to work those quarries for his own benefit; he also contended, that although he had no feudal right in the soil itself, yet that those quarries were to be considered as part of the perquisites of the office; and that it appeared from the evidence which he adduced in the cause, as to the working of those quarries by his predecessors, that that fact, coupled with the nature of the grant possessed by him, entitled him to work those quarries.

The original grants in 1646, grants to Sir James Hamilton and his heirs-male. (His Lordship then read the words of grant.) My Lords, the charter granted to the Earl of Haddington, the hereditary office, 'Custodiam Roberarii nostri lie Park de Holyrudhouse cum omnibus re-'ditibus proficuis divoriis viridariis feodis casualitatibus privilegiis et emo-'lumentis quibuscunque ad idem spectantibus et pertinentibus;' also, the power of constituting and of dismissing park-keepers in the said Park; and then there is the tenendas clause, as it is called, the effect of which was to grant this office to him and his heirs, together with all the privileges, and as some argument has turned upon that, it will be necessary to call your Lordships' attention to it. (His Lordship then read the tenendas clause.)

In order to show that quarries have been worked within the Park anterior to this grant, there were produced certain entries from the Town-Council books of the City of Edinburgh, the earliest of which, I think, is dated 15th of June 1554, and is in these terms:—'The quhilk day the 'Provest, Baillies, Counsale, Dekyns of Craftis, with ane gret part of 'uther honest men of the burgh, at the requeist of Mare Dowrair and 'Regent of yis realm, moder to our soueraine Lady ye Queins Grace, 'comperand be my Lord of Dunfermling and Sir Johnne Campbell of 'Lunde, Knycht, her Gracis master houshald, consentit to big on yair ex-'pensis ye haill sloppis in ye park dike circulit about Arthour Sett, Sa-'lisberie and Duddingstoun Craggis, under protestatioun yeit the samin 'prejudgit nocht them anent ye calsey stains quhilk yai wer in use to get

'furth of the saidis cragis quhen yae had ado yrwith.' From which it appears, that at that time the city of Edinburgh was accustomed to take stones from those Crags. At that time, I should state to your Lordships, it should seem the Park was in the hands of the Crown. There had been no grant at that time of this hereditary office of the keeper of the Park. May 26, 1826.

Then, on the 28th of March 1559, there is this entry:—'The same 'day compard John Robertson, fleaher and tacksman to the King's G. of 'his M. Park and was content and consentit that the toun sall half yearly 'calsey stains furth of the samen, not hurtand his corne, grass, or guids, 'and repairand the skayth in caise ony be sustained.' From this it appears that Mr Robertson, who was at that time the tacksman of the Park, consented that the town should carry stones out of the Park, not hurting his corn or grass. There are other entries somewhat to the same effect in the years 1664, 1668, and 1675; and then after the grant to Sir James Hamilton, there is an entry on the 3d of December 1675, by which the Council 'recommends to Bailie Hay, the treasurer, and Deacon Ha-'milton, to speak with Sir James Hamilton, that in setting of the King's 'Park, there be liberty reserved to the good town to win stanes, and lead 'the same from the said work, for helping and making the public calseys.' And on 15th of December 1675 there is this entry:—Report was made by Bailie Hay, 'that he having met with Sir James Hamiltoune, anent a 'liberty to be reserved for the town to wine calsey stones out of the 'King's Park, which the said Sir James Hamiltoune most willingly con-'descended to, that the town should have that liberty.'

My Lords, it does not appear to me that any inference is to be derived from these entries; that the keeper at that time claimed a right to those stones produced, and many of those quarries, he being the keeper of the Park. It appears that his consent was necessary to enable the town to get stones for the purpose of paving the town, and other public uses for which they were required; and it does not appear to me that it is to be inferred, that the keeper himself claimed a right to the profit arising from the stones, which were thus taken by the town. It is true, that in 1680, there is an entry in the Town-book of Edinburgh, that 'the Council ap-'poynts Magnus Prince, town threasurer, to pay to the relict of Alexan-'der Todrig, keeper of the King's Park, the soume of fourtie pounds Scots 'money, and that for two thousand and fyve hundred calsey stanes, at 'sixteen pounds Scots per thousand, furnished be the said deceast Alex-'ander Todrig to the good toun, conforme to a particular accompt, yra-'nent thir presents shall be a warrand.' Then, on 20th January 1697, there is an entry, that 'the Council upon the threasurer's report, that he 'had appointed several persons to furnish calsey stones, which are now 'ready to be carried out of the King's Park, do therefore appoint the 'threasurer to advance money for that use, and to cause carry the said 'stones to ane convenient place for the use of the good town, whereanent 'thir presents shall be a warrand.' But, my Lords, certainly in the last century, since 1691, my Lord Haddington's predecessors appear to have

May 26, 1826. granted tacks and leases from time to time, authorising the lessees and tackamen to take stones out of the Park, 'to open and work stone quarries and causeway stones in any part of the grounds of the lands, and 'to sell and dispone upon the stones workt by them out of the same at 'their pleasure.' Therefore, certainly it should seem that in these tacks the keepers of the Park did take upon themselves to dispose of the produce of the quarries; and from the year 1814 down to the present time, those quarries have been worked to a very large extent indeed by my Lord Haddington. It is stated in the case, that in 1818, 2920 cubic yards had been quarried from Salisbury Crags, for the purpose of making the new Calton Road; and since that time, immense quantities of stone have been taken.

Under these circumstances, the case came before the Lord Ordinary upon the question, whether or not, under the grant of the office of keeper, and the profits attached to that office, coupled with the acts of possession for a long series of years by the Earl of Haddington and his predecessors, the Earl had a right, as part of those profits, or having a right to the soil under that original grant, to work those quarries to an indefinite extent for his own benefit, and my Lord Ordinary pronounced this interlocutor. (His Lordship then quoted the interlocutor.) This interlocutor, therefore, goes to the extent of establishing an unlimited right in the Earl of Haddington to work those quarries. This cause then came before the Second Division of the Court of Session; and upon its coming before them, a very great diversity of opinion was entertained by the learned persons constituting that Division; a majority, however, of them were of opinion, that the right of the Earl of Haddington was established by evidence in the case, and by the grant; but still they seem to think that it could not be an unlimited right, because, to be sure, if it were an unlimited right, by means of the supposed profits of this office, the whole of the substance of the Park might be carried off by the Earl of Haddington. Feeling this difficulty, they seemed to think that his right must be a limited right; but to what extent was the difficulty? But feeling the difficulty, they thought they hit it by inserting these words in their judgment, which I am about to read to your Lordships. They adhered to the Lord Ordinary's interlocutor, by which he found an unlimited right in these quarries, but they added the qualifications, 'that in respect no abuse is 'alleged to have been committed, adhere to the interlocutor complained 'against, hoc statu.' Now, my Lords, that interlocutor, perhaps, is, with great deference to the Court of Session, very difficult to be understood. If they had said in this interlocutor, 'My Lord Haddington has a limited right—limited to such and such an extent, and it has not been proved 'before us that he has exceeded that limit,' to be sure, one could then have understood the nature of those words. But your Lordships will observe that the Court adhere to the Lord Ordinary's interlocutor, but they add these words, 'In respect no abuse is alleged to have been 'committed, adhere to the interlocutor reclaimed against, hoc statu.' This interlocutor did not satisfy the Officers of State, and they, by a re-

claiming petition, brought the matter again under the consideration of that Division of the Court of Session; and on its being brought again under their review, they, feeling the difficulty of the case, came to this conclusion, to which they had not previously arrived, that it was quite clear that my Lord Haddington, under this grant of the office, notwithstanding the supposed possession, had no feudal right of property in the Park of Holyrood-House, and therefore they found, 'That the defender has no feudal 'right of property to the Park of Holyrood-House.' This was with the view to guard against a conclusion which might otherwise, perhaps, have been derived from the Lord Ordinary's interlocutor, that that interlocutor had established a feudal right of property in the Park. But, however, on consideration, they were all of opinion, and I apprehend they came to that conclusion with great propriety, that this grant of office, with general profits, did contain no feudal right of property to the Park of Holyrood-House, but they still found that he had a right by virtue of his office, and in consequence of this long supposed possession, to take the stones, and to work these quarries, still adhering to that qualification of the interlocutor, that no abuse has been alleged. May 25, 1618.

My Lords, with all that deference and respect which I sincerely entertain for the decision of the Court of Session, I must confess to your Lordships, that I feel a little difficulty in reconciling the different findings of these interlocutors. That they were quite right in finding that Lord Haddington had no feudal right in the Park, there is no doubt, and there is no objection at all by Lord Haddington against that finding; but as the interlocutor now stands, the Lord Ordinary has found an unlimited right in Lord Haddington to work those quarries—there is no qualification; and in regard to the words introduced, 'in respect that no abuse has 'been alleged,' I think that your Lordships will see that it is extremely difficult to apply those words to the finding of the Lord Ordinary, for if it were an unlimited right, I do not see how any abuse can be committed. If it were a limited right, (and the Court of Session has found what was the extent of that right,) and if no abuse of that right so limited had been established, then the interlocutor would have been perfectly intelligible.

I do not feel it necessary to trouble your Lordships with the opinions of the learned Judges at length. They have given very elaborate opinions, and considered the question as one of no ordinary difficulty. It is a question of difficulty and of importance, both as it respects the rights of the Crown, and as it affects my Lord Haddington. If Lord Haddington has that right, I will say no more, than that the ordinary right he has to work the quarries must have been as part of the profits of his office. It is very true, that it appears to be admitted, that, by virtue of the office of hereditary keeper of the Park, he is entitled to the pasturage of the soil; but it is a very different thing, whether a keeper is entitled to the soil itself; and as has been put in this case, what is to prevent my Lord Haddington from sinking a mine, or making a quarry, close to Holyrood-House? Perhaps your Lordships are aware that Holyrood-House is si-

May 28, 1830. tuate close to this Park—the Park extending up to it and round it. I do not know whether the Court of Session meant to find that Lord Haddington was entitled to work only ancient quarries—those that may be considered from usage to be ancient quarries, but they have not so expressed it in any of these findings. My Lords, considering, therefore, the discordance of opinion of the Learned Judges in this case, and considering also the very great importance of this opinion to the Crown, as also to the Earl of Haddington, I really should propose to your Lordships in this case, to affirm the interlocutor, finding that the defender has no feudal right of property in the Park, which I think that your Lordships ought to do, there being no difficulty upon that question; and that your Lordships should do that, because I observe that Lord Haddington, in his petition of appeal, has not confined his appeal to the other parts, but has appealed generally, it may be well to affirm that part of the interlocutor; but in respect of the rest, in order that the question may be more maturely considered, and that the Court of Session, if they should be ultimately of opinion that my Lord Haddington has a limited right, may have an opportunity of defining what is the extent of that right, which at present remains undefined in this interlocutor, I should propose, my Lords, to refer back the cause upon the other findings of these interlocutors, for the review of this branch of the Court of Session, and considering the importance of this case, I should propose to your Lordships to do in this, as I have ventured to propose in other cases, to desire that that Division of the Court of Session would take the opinion of the other Division of the Court of Session, upon these very important questions.

My Lords, I apprehend that no injury will be sustained in the meantime, to the rights of the Crown, supposing, and it is not for me to state what the ultimate decision of the Court may be—but supposing it should be ultimately decided against the Earl of Haddington, I feel quite satisfied, that nothing will be done in the meantime which can injure the property in question, beyond that fair exercise of right which is at present established.

For these reasons, therefore, my Lords, on this occasion I have rather cautiously abstained from going more fully into the arguments of the case, in order that the question may not be prejudiced by anything that passes here, before the Court of Session has had an opportunity of reviewing and considering the findings of these interlocutors, and taking the opinions of the other Judges. Without further observations in this case, I should propose to your Lordships to come to that judgment I have suggested; to affirm the interlocutor, finding that the Earl of Haddington has no feudal right to the property in this park, and that as to the remainder of the said interlocutor, to remit the case back to the Court of Session to review the same, and directing the Division in which it was pronounced, to require the opinion of the other Division of the Court.

Appellants' Authorities.—Bannatyne, June 25, 1624. (12769.)—2 Ersk. 3. 23.—Lord Aboyne, Nov. 16, 1814. (F. C.)—2 Ersk. 9. 59.—2 Stair, 6. 4.—Manwood, p. 143.—1 Coke, 536.—3 Ersk. 7. 4.—2 Stair, 12. 16.—3 Ersk. 7. 10. and 12.—Forbes, Jan. 31, 1822. (1 Shaw and Ball, No. 322.) May 26, 1826.

Respondent's Authorities.—King's Advocate, (2 Dict. 102.)—Lord Kennet, Mar 1, 1769. (10781.)

A. MUNDELL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

JAMES BRYCE, Appellant—*Keay—Campbell.* No. 36.

JOHN DICKSON and Others, Interdictors of JAMES BRYCE; and ANDREW STEELE, his Agent, Appellants—*Shadwell—Abercromby.*

WALTER GRAHAM, Respondent—*Warren—Miller.*

Idiotry and Furiosity—Tutor and Curator.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and on an application by him and his interdictors having refused to recall the appointment, and repelled an objection that his fatuity could only be ascertained by the verdict of a Jury; and having found both his interdictors and agent liable in expenses to the curator,—the House of Lords remitted to review the judgments on the merits, reserving the question of expenses.

May 26, 1826.
1ST DIVISION.

DAVID BRYCE, merchant in Edinburgh, died possessed of heritable and moveable property, amounting in value to several thousand pounds. He left a brother, the appellant, James Bryce, (who was a Student of Divinity, and had been admitted to trials, but rejected), and a sister Mary, who was married to the respondent, Walter Graham, residing near Edinburgh. In 1816, and soon after David's death, Mary Bryce, with concurrence of her husband, presented a petition, under the act of sederunt 13th February 1730, to the Court of Session, setting forth that James was in such a state of mental imbecility as disabled him from attending to his affairs; and this was supported by the certificate of Mr Abercromby, a medical gentleman, who had been for several years acquainted with him; not on oath, but simply on soul and conscience. The petition was intimated, in common form, by affixing copies on the walls of the Outer and Inner-House—but not to James Bryce personally. No appearance being made by him, the Court appointed Walter Graham to be his curator bonis, in terms of the prayer of the petition. Graham then found caution according to the act of sede-

May 26, 1826. runt, took possession of the whole effects, collated the heritage (which was inferior in value to the moveables), and received Bryce as an inmate in his family. In 1818, Bryce granted a bond of interdiction in favour of John Dickson, Esq. advocate, Andrew Steele, W. S., and others. A petition was then presented on the 3d of June to the Court by Bryce, with consent of his interdictors, stating, that although Graham had found it for his interest to treat him as an idiot; and had, with the view of getting possession of his funds, obtained himself, in absence, nominated curator bonis to him, yet the allegation of his being imbecile was untrue—that the Court had no power to place him permanently under a curate—that the conduct of Graham had since been exceedingly cruel—or that, at all events, his appointment should be recalled, and that he should be ordained to account for his intromission, and Steele appointed in his place. The petition was signed by Mr Dickson as counsel, and Mr Steele's name was prefixed to it as agent. On the part of Graham, it was stated that this application originated with, and had been prompted by Steele—that both he and the other interdictors could not fail to know that Bryce was in a state of idiocy—that the Court, on being satisfied of the fact, was entitled to appoint a curator to a person in that condition —that the allegation of maltreatment was untrue; and, therefore, the petition ought to be refused, and the interdictors found liable in the whole consequences of presenting the petition. On advising the petition, with answers, replies and duplies,

* *Lord Hermand* observed, that this was a very irregular and irrelevant application. That he saw no title the gentlemen named as interdictors had to concur in such an application; and that it must have arisen from a wish to take advantage of the unfortunate petitioner's imbecility. A bankrupt land-surveyor could not be supposed to act from motives of humanity, as alleged. What was the use of a bond of interdiction in the present case, where the property was all moveable? It could avail nothing, but it pointed out that the petitioner was unable to manage his own affairs. The story of cruel usage was positively denied, and there was no relevant statements made against the curator's accounts. For his part, he thought the defender's conduct blameless. The story as to the defender collating without the authority of the Court, was most absurdly brought for-

* These and the other notes of the Judges' opinions were laid before the House of Lords.

ward. The collating showed that the defender wished to act fairly. If he had not collated, but had put the whole moveable property into his own pocket, as he might have done, then there would have been some grounds for complaint. As matters stood, however, he saw no good reason for removing him; and he therefore moved, that the application should be dismissed. May 26, 1826.

Lord Balmuto.—His Lordship concurred with Lord Hermand's opinion *in omnibus*. Were the Court to listen to such an application as the present, they might as well pay attention to the application of any common porter on the streets, who might pretend that he held a letter from any madman complaining of ill usage. There was a certificate from a surgeon produced by Mr Graham, which was sufficient evidence to vouch Bryce's incapacity, and the letters in favour of Bryce he paid no regard to.

Lord Balgray stated, that it was his opinion that their Lordships were bound to inquire farther into the present case. If they had improperly appointed the defender curator bonis to the petitioner, then he ought to be removed. He thought the taking the bond of interdiction from the petitioner a proper method, if he was of opinion that he could not properly manage his own matters. A man may be inclined to spend money foolishly, and so forth, but why not be indulged in his own folly? This Court have surely no title to tie up the hands of such a person; yet, if he chooses himself to tie up his own hands by an interdiction, he is so far right. His Lordship said that he had himself advised an interdiction in a similar case, where, after examination, the curator was removed. The line of conduct adopted by the Court in the case in which he was concerned, was to remit to two respectable medical gentlemen to examine the person and report, and he would advise some similar mode in the present case. A remit should either be granted to one of their Lordships, or to the Ordinary on the bills to take a cognition, or to medical people to report; and though he would not publicly name who he thought the best medical persons to whom the remit should be made, yet he would do so to any of the parties privately. This Court might unwarily appoint a curator to a person who did not require it, or at least who was so far himself as to be entitled by the law to manage his own affairs in the best way he could; and if they had done so, however low or mean the persons might be who gave the information of the erroneous appointment, the Court were bound to listen to it, and give redress, if necessary. He was certain, from the respectability of the gentlemen whose names were prefixed to

May 26, 1826. the present application, (most of whom he was acquainted with, and one of them intimately so,) that they could not have been induced, from improper considerations, to give their sanction to an application such as the present; and therefore the Court was bound to inquire into the true state of matters. A knowledge of Greek or Latin, or of any other language, was, to be sure, no proof of a person's capability in properly managing his affairs. He was himself well acquainted with a gentleman who was perhaps the best mathematician of the present day, but who could not be intrusted with the management of a single sixpence; yet he did not think the Court was entitled to appoint to him a curator, as he could not come under the appellation of fatuous.

Lord President.—His Lordship concurred in opinion with Lords Hermand and Balmuto, and went over nearly the same arguments, adding, that if Mr Bryce was maltreated by his brother-in-law, he should have complained to the Procurator-Fiscal of the county. The curator was an officer of Court, and had given in his accounts; and, no doubt, if objections were applicable to these accounts, Mr Bryce was entitled to make them, and the Court was obliged to listen to them, but he observed none made. His Lordship, therefore, proposed to refuse the petition, and find the interdictors, as consenters to the petition, liable personally in Mr Graham's expenses.*

The Court accordingly, without taking any proof, refused the petition, and found 'the several interdictors, with whose consent 'the petition has been offered, conjunctly and severally liable 'to the respondent in the expenses of process.' Against this judgment Bryce reclaimed, again contending that the Court had no jurisdiction to affix to him the status of an idiot or insane person; or to deprive him of the possession of his property and transfer it to another; that his state of mind could only be ascertained by the verdict of a jury; and that, at all events, the Court could not treat him as an idiot, or refuse to listen to his allegation of cruel treatment, without taking evidence of the fact. The interdictors did not concur in this petition, but Mr Steele continued to act as agent for Bryce. On advising it with answers:

Lord Hermand stated, that the interdictors had not petitioned against the interlocutors, finding them liable in expenses. He therefore thought that the interlocutor was final quoad them,

* Lord Succoth was not present.

and that they ought to be obliged to pay the expenses, as he conceived their conduct was highly reprehensible. He was clearly of opinion, that the original petition by Graham was perfectly regular, and had been properly intimated: That it had proceeded on the usual certificate of a surgeon; and that if the Court was to entertain a different opinion, then all they have been doing for a century past is wrong. The present petition, he must unwillingly hold to be the petition of James Bryce, though he was inclined to think it was not, but of the persons who had so improperly interfered in this matter. It was necessary, however, that some inquiry should be made, and he would recommend to the Court to remit the matter to Dr Gregory, or any other of the most respectable gentlemen of the medical line, with instructions to examine the petitioner and report. May 26, 1826.

Lord Succoth agreed with Lord Hermand, both with regard to the regularity of the original petition, and as to his doubts of the present petition being that of James Bryce, and also as to the propriety of remitting the matter to medical gentlemen. His lordship said that he was absent when the first interlocutor was pronounced, but that, upon reading the answers, he thought the interlocutor was correct. He believed that most of the interdictors, nay, that all of them, were respectable, but still he thought their conduct was very incorrect, and, therefore, that they should pay the expenses.

Murray, counsel for Mr Bryce, here stated he was called on personally by Mr Bryce, who gave him the information necessary to draw the petition.

Lord Balmuto stated, that the original application was perfectly regular, that it had proceeded on a certificate, not given from a casual look at the petitioner, but it bore in grœmio to be on an acquaintance of years, Mr Abercrombie having been the surgeon of the family; and it also bore to be on soul and conscience, and Mr Abercrombie was a most respectable man. He believed the present petition to be that of Mr Steele, not of Bryce. What right had Mr Steele to obtrude himself either on Mr Bryce or Mr Graham? was he to become the Don Quixotte of all the mad people of the kingdom? He might as well set up as a trustee for converting the Jews.

Lord Balgray said, that as to the regularity of the original petition there could not be a doubt. The Court also was bound to hold this petition as the petition of Bryce. He was, however, clear that, by the law of Scotland, a person was not to be deprived of the management of his own affairs without proper investigation. He therefore advised that the matter should be re-

May 26, 1826. mitted to the Sheriff, with instructions to make what inquiry he judged proper, and report.

The Lord President concurred with Lord Balgray.

The Court then pronounced this interlocutor: 'They remit to the Sheriff-depute of the shire of Edinburgh to inquire concerning the condition of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage and conduct his own affairs; and also concerning the truth and sufficiency of his grounds of complaint, of harsh or improper treatment, or neglect of his comfort on the part of Walter Graham his curator bonis, authorize and direct the said Sheriff to proceed in the inquiry by personal visitation of and intercourse with the said James Bryce, at various times, and without previous warning or concert, as also by examination upon oath of such witnesses, suggested by either party, who have sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the Sheriff to visit him; and ordain the said Sheriff to report his opinion on the said matters, and each of them, to the said Lords. And in case a minute shall be offered on the part of James Bryce, praying for a direction to the Sheriff to proceed in the said matter by Jury or inquest, allow the clerk of process to receive and mark the same as part of the process, and allow the said curator bonis to answer the said minute in case he shall see cause so to do.'

Bryce then lodged a minute, contending that the question of fatuous, or not, could only be determined by a jury. This minute was not answered.

Both parties led a proof before the Sheriff, in the course of which a number of witnesses, consisting of medical gentlemen, the counsel for Bryce, tradesmen, and others, were examined. Steele having been obliged to pay one-half of the expense of this proof, notified to Bryce that he thenceforth would cease to act as agent. A petition was then lodged in name of Bryce, praying for counsel and agent. The Court appointed Mr Jeffrey and Mr J. A. Murray counsel, and Mr Dymock, W. S. agent for Bryce. This petition, it was alleged, was drawn and presented by Steele. The Sheriff, on considering the proof, reported, that after repeatedly examining Bryce, and causing him to be visited by several medical gentlemen, he was satisfied from their reports, and the testimony of the witnesses, that Bryce laboured under a very great degree of mental imbecility; that he was utterly incapable to manage and conduct his own

affairs; and that there was no foundation for the allegation of maltreatment. Counsel were then heard in presence on the proof; and on resuming consideration of the case,— May 26, 1828.

*Lord Hermand** observed, that it was favourable for Mr Graham, the curator bonis, that he had of his own accord collated the heritable and moveable property, on succeeding to David Bryce.

The first point for consideration, was the incapacity of James Bryce for managing his affairs; and on that subject he thought James Bryce part of both an idiot and a madman, from the proof led by Mr Graham, for he paid no attention to any part of the evidence for James Bryce, except the deposition of Kay; and he considered it to be exceedingly wrong to give printed papers to Ross and Dr Esplin, and the account-book seemed to be made up not by Bryce himself.

The second point related to the question, whether the Court had any title to take the property of James Bryce out of his own hands without a jury. He said, many applications for curatories have been made to this Court—are all of these illegal? Certainly not.

As to the interdictors, they are volunteers in this business. They are very respectable gentlemen, I confess; but they have attempted to deceive the Court, for this man is incapable of acting, and they should be personally liable in all expenses.

Lord Balmuto.†—The question is, whether or not there is ground sufficient to warrant the curatory that was granted in this case. The application for its recall was made by certain persons, calling themselves interdictors to James Bryce, who say that there was no occasion for the curatory to be granted, and that such has been the curator's conduct that it should be recalled.

I consider that it has been the immemorial practice, and assented to by the country, that this Court should exercise a superintending power in cases similar to the present. This is now the established law. The act of sederunt passed with regard to this subject, requires the curator appointed to find security for the funds of the person whose property he is appointed to take charge of. You have every day applications for curators to persons in the situation of this unhappy man, and for persons in the highest rank in the country, to whom curators are appointed, after receiving the opinion of medical practitioners specially appointed by the Court, as to the mental situation of

* This speech was revised by his Lordship.

† His Lordship revised and corrected this speech.

May 26, 1826. the person to whom curators are applied for. Here, by immemorial and uniform practice, the Supreme Court is authorized to apply a remedy for such a case as the present. It would be deplorable and unfortunate for such persons, if there was not a remedy to protect them against swindlers, and persons who have only their own interest in view. This unhappy man, from infancy, appears to have been of an imbecile mind. Whence does this cause arise? Clearly from those persons calling themselves interdictors. Without any connexion, or, some of them, even acquaintance with this unhappy man, they walk into his lodgings, and persuade him he has been ill treated by his sister; that the appointment of a curator was irregular, illegal, and unnecessary. At the same time they obtain from him a bond of interdiction, appointing them to manage and take charge of his affairs, the very ground of which bond is the imbecility and weakness of the person who grants it to manage his own affairs; and being thus authorized, as they suppose, they apply to your Lordships to recall the curatory which was granted, upon minute inquiry, and a certificate by a respectable medical gentleman, of the unfitness of this unhappy man, Mr Bryce, to manage and conduct his own affairs.

Your Lordships minutely investigated this matter, and were so dissatisfied with the application for the recall of the curatory, and those persons volunteering in the business, that you found them personally liable in expenses. They ascribe their conduct to humane feeling, but I cannot give credit to such statement. I apprehend, that if this man had not been possessed of some fortune, this application would not have been made.

After the first pleading, your Lordships having ordered an investigation, upon which you could judge whether the curatory should cease—what has the proof brought out? It shows that Bryce is nearly a complete idiot, and incapable of managing his affairs. In order to mislead your Lordships as to Bryce's capability of exercising his own judgment, he was instructed, with the assistance of the clerk of one of the interdictors, to purchase some trifling articles, and enter the same in a book, of which the poor man himself did not understand the meaning. Such conduct was certainly improper. Papers in the cause were also given to particular persons, who were to be examined as witnesses, which was highly improper.

Upon the whole circumstances of the case, and proceedings that have taken place, I am perfectly satisfied we were called upon, and in duty bound, to appoint a curator for this unhappy man; that the conduct of the curator so appointed has been highly proper and correct; and that there are no grounds what-

ever for recalling it; therefore, that the present application for recalling the same ought to be refused, and the petitioners found liable in the expenses. May 28, 1830.

*Lord Succoth.**—This case appears to me to involve a question of the very first importance—a question of general, and, I may almost say, of constitutional law. Viewing the question in that light, I consider it my duty, after hearing the very able pleadings of the counsel, to go minutely into all the authorities to which they referred. And after attending carefully to these authorities, I still consider the question, whether the Court of Session has an original radical jurisdiction to judge of the situation of a person alleged to be incapable of managing his own affairs, without a cognition by a jury, as one of great difficulty; the more especially as it goes, not merely to a temporary arrangement, but to the permanent management of the unfortunate person now before us. If that is the true nature of the question, I need hardly say, no more important case has, perhaps, ever been before this Court.

In the view that I have taken of this question, your Lordships will at once see, that it is not necessary for me to go minutely into the proof which has been led. It is clear from the evidence, and particularly from that of the medical gentlemen, that Bryce is not an absolute idiot, although some of the witnesses say that he is not capable of managing his own affairs. But supposing that to be the clear opinion of many of the witnesses, the question still remains, whether, before this Court can permanently appoint a curator bonis, the situation of the unfortunate man ought not to be judged of by a jury upon a brieve for cognossing him, when the proof will be taken in presence of the jury.

When such a proceeding is adopted, (which I shall show is the regular mode,) it seems to me to be attended with various advantages. As the evidence is taken before a jury, there is a better opportunity of sifting it fully. The jury have likewise the advantage of seeing and conversing with the unfortunate person whose status is in question.

I admit, from the well-known ability of the person by whom this proof was taken, that it would be conducted in the very best manner, but still it comes to us at second hand.

On this part of the subject I shall only say, I wish some more questions had been put to the medical gentlemen. They all say they do not think Bryce capable of managing his own affairs, but I wish more special questions had been put to them.

* His Lordship revised this speech.

May 26, 1826. I should have wished this question had been put, among others, Whether, in their opinion, from what they had seen of him, he has any disposition of a spendthrift in him? whether they thought there was any danger of Bryce's squandering his fortune, or of his throwing it into the sea. From what I see in the evidence, I do not believe the medical gentlemen would have said there was risk of any such thing. There is no appearance in the proof of his being of prodigal habits. On the contrary, he appears to be careful—not inclined to drink in tippling-houses, or spending money in any improper way.

But I am only stating this in passing. According to my view, all this will be better investigated when the case shall go to a Jury on a brieve, procured by a person having interest.

The general principle, I conceive, is, that when a question of status of this description has been rendered contentious by opposition being made, and the matter has been brought fully before us by persons authorized to act for the party, as in this case, the Court of Session has not an original radical jurisdiction to judge whether the man is an idiot or compos mentis. The situation of the person ought to be previously ascertained by a Jury, summoned upon a brieve from the Chancery.

In saying this, I beg to be understood to make a distinction between an interim and a permanent management—a distinction which it appears to me material to keep in view, considering the authorities appealed to on both sides.

A temporary management may with propriety be ordered by the Court of Session, but it is a different question whether they can authorize a permanent management without a previous cognition. In the case of a mere temporary arrangement, the Court acts ex necessitate to preserve matters entire—to guard against risk of the subject of contention being lost before there is time to ascertain the state of the person by means of a Jury.

I therefore agree, that nothing wrong has been hitherto done by the Court—that we have been acting justly and agreeably to former practice, by naming a curator bonis to act till a cognition takes place, because I conceive it to be within the power of your Lordships, acting in cases of this kind ex necessitate, in order to prevent great evils, to order a temporary arrangement of the kind to take place. But my difficulty in the present case arises from this, that those having interest decline to bring this unfortunate person before a jury.

I admit that this Court has a right to judge of the status of a man in all cases, where that question occurs incidentally in another question, in which the Court has clearly jurisdiction,

as whether a marriage is null or not on account of the person being alleged to be incapable of consent. When a question of marriage occurs, it is unquestionably competent, and within our powers in deciding the question of marriage, to judge incidentally whether the person is an idiot or not. May 26, 1826.

In the same manner, when another class of questions come before us, viz. such as relate to deeds or settlements made by a person alleged to be non compos, we necessarily must judge of his situation at the time of the execution of the deeds, for unless we do so, we cannot explicate our own jurisdiction.

This was the situation of the case of Blair of Borgue and others, which were much commented on by the Counsel. In the case of Blair, a marriage was declared null from the idiocy of one of the parties, though a child had been born of the marriage. We were obliged there to judge of the situation of the parties, in order to decide whether the marriage was good or not.

But in the present case my difficulty is this, that here there is no marriage;—no settlement executed, no deed done by this person Bryce, the validity of which is brought before us. We are not called upon here to judge incidentally of the status of this man, in determining a question to the decision of which we are clearly competent. If that were the nature of the case, I could have no difficulty about it. But here the situation of Bryce is the only question. The point is whether Mr Bryce is capable of managing his affairs or not, and the question is whether it is competent for us to judge of that matter upon the proof before us—or whether it is agreeable to the law of Scotland, and to the principles recognised by the different authorities appealed to, to do this without having the status of this man ascertained by a Jury, in a regular process of cognition.

There are a variety of cases which are extremely analogous to the present, which throw considerable light on the question.

Take first the case of a tutor at law served to a pupil. It is the law of this country that tutors at law cannot serve till there has been a cognition.

Take the case of a testamentary tutor, where a father has named a tutor to his son, thinking him incapable of managing for himself. There also the tutor cannot enter upon his office until there has been a cognition and verdict finding the son incapable. I see that clearly laid down by Mr Erskine, B. I. t. 7. § 49. He says, 'There has been, it is believed, no instance in our practice of testamentary tutors given to idiots; but surely where

May 26, 1826. 'any natural incapacity appears in a son for management, the 'father is as justly entitled to name a curator to manage for 'him, as he is to appoint one for protecting him against the 'follies of youth; and this was the doctrine of the Roman law. 'L. 16. De Cur. Furois. Yet before the testamentary curator 'can enter upon the exercise of his office, the son ought to be 'declared or cognosced an idiot by the sentence of a Judge; 'since no person is after majority to be denied the right of con-'ducting his own affairs, unless he be properly declared incapa-'ble of it. The regular method, therefore, pointed out by our 'law for declaring fatuity or furiosity, is by brieves issuing from 'the Chancery, and directed to a Judge, who is ordained to call 'an inquest for inquiring first into the person's true state.'

Both the case of the tutor at law served, and the case of the testamentary tutor, not having power to act till a proof has been regularly led before a Jury, do strongly operate with me in judging of the present case. They show what is the genius of our law on that point.

Let us now look to another class of those tutories, of which a good deal was said in the course of the pleading. I mean tutories dative. With regard to them there is certainly more doubt. It appears to me that the practice in Exchequer has been different at different periods. In the earlier times, both the Privy Council and the Court of Exchequer sometimes proceeded without a cognition: but the more recent practice has been otherwise; and I believe I may safely say that for 40 or 50 years, it has been the practice not to grant tutories dative till after the party has been cognosced by a Jury, although these are in some respects of a more temporary nature than the other tutories, as they take effect only till a tutor at law shall serve. Surely it is to the modern, and not to the ancient practice we are to look.

Sir G. Mackenzie, in his observations on the Act 1475, c. 66, says, 'at least the Exchequer will not grant tutories da-'tive, unless their condition be first tried by an inquest.'

In his observations on the Act 1585, c. 18, he seems at first sight to lay down a different doctrine; but he is then speaking only of a temporary management, and his meaning is, that the Lords of Session were not then in use to appoint curators bonis, except for a temporary purpose.

There is another subject, which I shall just touch upon, to show the difficulties that here occur, and that is as to the right of Mr Bryce to make a settlement. We all know that a person of very little mind may make a settlement, and various instan-

ces might be pointed out of settlements made by persons of very weak understandings, and in circumstances similar to those which arise here, which have been sustained. May 26, 1826.

Suppose your Lordships without any qualification continue this curator bonis, and this Mr Bryce makes a settlement, it strikes me that the continuing this curator bonis would operate strongly against such settlement.

There is another class of cases, which throw difficulty upon this question, and which have occasioned considerable doubts in my mind. I allude to a case where there has been a cognition, and where the party has been alleged to have become convalescent. In such cases I understand it to be competent to proceed in this Court by a declarator, with a reductive conclusion at the instance of the person cognosced.

Suppose such a declarator brought, I understand it is competent for us to judge of his convalescence without sending him again to a jury. That certainly is a case which throws difficulty on the present. But I think there is room for a distinction between the cases. In the one case you are setting a person aside from the management of his property: in the other, you are setting him free from the restraint imposed upon him, which is a more favourable case; and besides, in it the Court are not exercising an original radical jurisdiction. Accordingly, the law from Lord Elchies, Tutor No. 12, recognises this distinction. A declarator of reconvalescence had been obtained, and then a relapse was alleged; but as he was relapsed and a call upon your lordships to take away his management, the Court thought that although they had it in their power to judge of the reconvalescence, yet they could not take it upon them to judge of the question of relapse, and therefore refused to interfere, and sent the case again to a Jury. Whether that distinction is founded on sound principle or not, I shall not pretend to say; but it shows the Court felt strongly the difficulty of taking away the management of a man's affairs from him without the verdict of a jury.

However well founded in principle I may consider the view which I have taken of this case, I should have given it up, if I had seen that it was contrary to the decisions of this Court; but no cases in point have been appealed to by the counsel as having occurred in this Court, where a person alleged to be incapable of managing his affairs and not far from being an idiot, was brought into this Court, and then in opposition he, or some other for him, had said, I am not of that description, and I am capable of a certain degree of will, and I know one thing from

May 26, 1826. another. I know my mind from yours, and I can give directions to somebody to plead my case, and to say who is the person should manage my affairs. If I had seen such cases, and disregarded all that had been said and judged on the proof led, I would have considered it right to abide by these decisions; but I have not been able to see such decisions.

The only two cases approaching to the present are what are mentioned in a note to Erskine's Institutes; the one something like the present, where the management was taken from a person by your Lordships; and the other where the management of affairs was taken from a person, on account of old age. But unfortunately I could get no more light from those cases excepting what is stated in the note in Mr Erskine's book.

They are not reported in any of the books of decisions, from which it would seem the reporters had not thought they were worthy of being reported. But if these cases had established the power of this Court to appoint a curator bonis without a cognition, when the fact of the party to whom he was so appointed being incapable of managing his own affairs was disputed, the collectors of Decisions would undoubtedly have reported them.

I have also looked through the papers of the Judge who then sat in the chair, and who was in use to preserve every case of importance, without being able to find either of these cases, and I am led from these circumstances to conclude that in neither of these was there any point of importance determined, or any considerable discussion.

Even in that note in Erskine, as it has been given to us, the ground of the Court's interference has been stated to be necessity. The act of sederunt 1730, therein referred to, it is to be remarked, specifies persons 'under some incapacity for the 'time to manage their own Estates.' These words are clearly applicable to a temporary incapacity. The act of sederunt indeed does not apply to such a case as the present. It applies chiefly to the case of persons absent. The words may perhaps apply to a person not absent, but under a temporary incapacity, when your Lordships must do something in the meantime, before cognition. But it would seem from the way in which the matter is stated in the preamble of the act of sederunt, that it was not in the contemplation of those who drew the act to authorize any management, even of a temporary nature, in the case of idiocy.

The case of pupils not having tutors is a very different one, and is a proper case for the Court exercising its power. There

is no room for cognition there. The same observation applies May 26, 1826.
to the case of a person absent. Therefore, there is no arguing from the act of sederunt, to such a case as the present.

I am aware, after all I have said, that there is one considerable difficulty remains behind. How are we to get a cognition in the present case? It is argued that the thing is impossible—If I understood properly, this unfortunate man has no other relations except his sister, and she says she will not purchase a brieve for cognoscing him, and that your Lordships cannot force her to do it. It is admitted that the sister has both a title and an interest to prosecute the brieve, but it is said that nobody else has such title and interest. I believe this is well-founded, for I am inclined to think it is not competent to the public prosecutor to purchase or follow out a brieve.

But suppose no other party to have an interest, there appears to me to be one way in which we can make it the interest of this lady to bring her brother before a Jury. Continue the curatory bonis for a limited period, ex. gr., two months, to give her time to purchase a brieve, and to take her brother before a jury, with this certification, that if she do not, the curatory bonis shall be recalled. That will make it her interest to take this step, which I hold to be the only legal mode of ascertaining whether her brother is capable of managing his own affairs or not.

That is, under all the circumstances of this most important and extraordinary case, the only conclusion to which I can arrive. This would be only a temporary management, an interim appointment of a curator bonis ex necessitate to prevent mischief, till there is time to bring this unfortunate man before a jury. As to what would be the consequence if the jury should not cognosce him, I do not think it at present necessary to say anything.

*Lord Balgray.**—The uncontrolled right or power of managing our property, is one of our most important rights that is protected by law. No man can be deprived of this power without a due investigation, and that done in a manner prescribed by law. In the case of an imbecile person, the Court has a peculiar duty to perform. You ought to be the guardians, protectors, and counsel for such persons. You are bound to protect them in their rights, and if it be one of their rights that they must be deprived of the management of their concerns in a certain way, you are bound to secure it to them.

* This speech was taken from his Lordship's notes, and those of a short-hand-writer.

May 26, 1826. When you are erecting yourselves into an authority to remedy the common law, you must look to what the common law says; and by it no man can be deprived of the management of his affairs except by a jury.

The original principle of our common law is feudal. The Prince, as Pater Patriæ, took the care of idiots and madmen, and tutories dative were given to whatever persons asked the office. This was the source of most gross abuses. It formed a public revenue to the Crown, both here and in other countries. The Act 10, James VI., c. 18, 1585, was meant to check that improper proceeding, and that none should have power to obtain custody of the person but the next agnate; that is the import of your law. The Act of Parliament lays it down, that there shall be cognition by a jury, and the Crown shall not have power to take charge of the person for whom the curatory is given from the agnate. Have you power to dispense with the common law of your country? And when you come to examine the authority of Mr Erskine, does not that tend to the same doctrine, and show the proper form of that common law, and that cognition is required as to the condition of every one, in whom is vested the natural power to manage his own affairs? I think that is a wise law. The rights of personal liberty are to be guarded, and the right of every one to manage his own affairs. Those are rights flowing from the law of nature, and are to be protected in every well-governed country.

In Scotland, the Privy Council were in use to interpose in all extraordinary cases, and, upon their abolition, many of their judicial powers gradually came to be exercised by the Court of Session; and in 1730, the Court made an act of sederunt, by which such factors as they appointed were to be regulated; but the preamble of that act of sederunt shows, that the Court limited themselves in these appointments to cases of temporary incapacity. It is a voluntary jurisdiction, by which they interfere to appoint factors and curators; and where all are agreed, no harm is done. They have no radical power; it *is in* the Crown. They have no right to dispense with cognition by a jury, and the interference of the Privy Council in such cases of necessity never could have superseded the ordinary rules of law.

The law of England is the same as ours. The radical jurisdiction in such cases was in the Crown, and the most gross abuses took place in granting curatories, as I said before, that could be imagined. Of late years, the mode proceeded in is this, that where a person's situation attracts notice, a petition is pre-

sented to the Lord Chancellor, backed with affidavits, and he grants for a time both the charge of the person, and the management of the property. May 26, 1826.

But I beg leave to mention, that when it appears to be necessary that there shall be a permanent management, he takes care the question of the necessity shall be properly tried.

Look to the Act, too, for Managing Mad-houses, 31st section; where an individual is entitled to apply for his habeas corpus, there is a most anxious charge for that purpose.

As to the proof that has been led in this case, as far as regards the report of the physicians, and a report of the Sheriff, how far are they conclusive? They are so to a certain extent. But what appears to me is, that we, who are to judge in this case, are not to be entirely guided by the opinions of any description of persons as to the condition of Bryce, but are ourselves judges of the proof. I do not care what any one says—he is not to lead my opinion. I am to judge in the matter as it is—I, who am to be responsible for what may be done in consequence.

When I come to view the evidence, I see there are some persons altogether unexceptionable, and who must have had opportunity of knowing Bryce, and whose testimony is in his favour. I cannot lay out of view the evidence of Mr Borthwick, advocate, and the Rev. Mr Johnston. It is impossible I should lay their evidence out of view; and it shows you, that what has been stated of Bryce's incapacity by his curator, cannot be true to the utmost extent; for though Mr Bryce was rejected on his trial as a clergyman by the Presbytery, yet before entering on the trial there must have been a certificate of the Professor of Divinity in his favour; and would he have granted it to a person incapable of managing his affairs? Therefore, even Mr Johnston himself, and Mr Bryce, were surprised at the rejection by the Presbytery. There is another thing I cannot lay out of my mind, viz., the evidence of the tradesmen. Part of this is said to be contaminated, but I cannot lay aside the evidence of Mr Dumbreck and some others. I know them personally. They are men incapable of giving false testimony to serve any one, and they are men of sound judgment and good sense.

Neither am I warranted to lay out of view the evidence of the curator ad litem, appointed by the Court to manage this case, Mr Dymock, nor what was stated by the two eminent counsel, appointed by your Lordships for Mr Bryce. I repose that confidence in their honour, that they would not state what they do

May 26, 1826. not believe; and if either of these gentlemen state an impression that Bryce does possess a certain degree of mind, I am not warranted to throw such statement out of my view.

What is then the general conclusion I draw? Although this person has been shown to be incapable of the management of his affairs, has he such a portion of mind as to know and feel he has a certain right, or not? Has he a sense of religion, a sense of right and wrong? Do the medical persons say he is *not* an entire idiot? Has he a sense of distinction between mine and thine? A sense of property? If he has a sense of that kind, may he not come here and say, It is true I may be *put* under management, and I am sensible of my deficiency in some respects, but allow me to be cognosced. I say he has a right to maintain that argument, and plea before your Lordships. If he has that right, when you come to apply the judgment, it ought to be a qualified judgment, so as to preserve the rights of both parties.

By such judgment you give the next of kin the power of preserving the property. On the other hand, you preserve the rights of Mr Bryce; for if you do not qualify the appointment of the curatory, it must be a permanent one.

Is the curator bonis ever to go further, if you do not qualify your judgment? He will go no further, and you are depriving Mr Bryce of the right which he enjoys by the law. You are turning him out of possession of his property,—putting him in a situation in which he could not easily recover that possession. How could he recover it, if he should wish the management taken from the curator? When he comes again, the curator bonis has possession of the funds; and what prudent man is to interpose to assist a man in such a situation? He must lay out his own money to assist Bryce, and expose himself to all the risk of obloquy, of interposing as from false humanity, or improper interference.

But what is the definite extent of power and onerous management, with which the curator bonis is intrusted? If it goes the length of vesting him with the custody of Bryce's person, and if he is next heir to him, it is contrary to all law.

If, again, it be most proper that the curator bonis have no concern, but to take care that his acts be not prejudicial to his estate, where does that consequence lead? Are you entitled to point out where shall be the personal residence of this person? Certainly not. And if he is inoffensive to other persons, and does nothing to call for the notice of magistrates, he is entitled to go where he pleases.

Then, I ask, what is the nature of his personal powers? If we look to all the different contracts, where they appear moderate and proper, so far, for instance, as regards his maintenance, clothing, and comforts of life: Are not all these effectual? No lawyer can dispute it. What becomes, then, of all his personal privileges? There are many he has, which no curator can exercise for him. Suppose him a freeholder, and capable of voting at an election for a representative in Parliament: what power can deprive him of exercising his privilege of voting? what more valuable privilege could he enjoy? May 26, 1825.

What more valuable privilege is there, than the persona standi in judicio? If he have a certain portion of mind, what right have you to say, I think you are an idiot, and you shall not stand at the bar? Have you that power? Has he not a right to come here, and if he makes a reasonable plea, must not you sustain him in that plea and right?

When you come to examine altogether the nature of the office of a curator bonis, as conferred by this Court, it is so anomalous, tending to such consequences, that such cases should be considered well before granting the office. Here it is granted without even summoning or informing the person whose affairs are to be taken out of his own hands.

Another point of consequence is this. I do not think that when an application is made in this way, the best evidence can be brought before you, to get at the person's situation. You have no primary jurisdiction: You do not get at the evidence which the law requires. What is the nature of the evidence? The proceeding is just of the nature of a precognition. The evidence is all taken on one side. You take the best you can get, but it is not evidence in foro contentioso. A person may be misled. And if in such a case it were possible to do an illegal thing, as in the time of the Privy Council, what is to hinder the same thing to be done here? It may be said that punishment would follow; but that is not sufficient. Law has a jealousy of such things. The evidence is of the nature of a precognition. The witnesses are examined only on one side, and such questions only asked from certain persons, as are sufficient to get the end in view accomplished.

Another material thing is, that before Bryce be deprived of managing his affairs, he should be before you: He should be cited and examined. A jury cannot pronounce a verdict unless they examine the person. In one case, from an error as to this, committed by the jury, and from the gross irregularity of the jury not calling the person before them, you set aside the ver-

May 26, 1826. dict. No verdict can be returned unless the person be present. And it is only in cases of necessity where that presence can be dispensed with.

The person must be produced for examination; and by the constitution of the law, the jury must return their verdict according to their own knowledge. The person cognosced has a right to that examination.

Upon these grounds, this case appears to me to be of very considerable importance. I am not moved by what Mr Clerk, one of the counsel for the curator, stated as to questions of status being entertained incidentally in questions of marriage. He might just as well say, that the Commissaries or Sheriff could name curators, because they may vindicate their jurisdiction in a similar way.

Can it be said that Bryce's property might be endangered by recourse being had to the common remedy of law? At the very instant a brieve is served, the whole acts and deeds of the person in question are interdicted. But the case is different in an application to your Lordships, till a certain period.

Then as to the expense of a cognition by a jury, I am astonished at that being stated as argument: and when persons of such ability as the counsel here lay hold of such a thing, I am apt to suspect that there is something wrong at bottom in their case. The expense is not a tenth part of what will be incurred in this Court, nor a fourth of the expense of the original petition to your Lordships. The brieve is 5s.; a retour 22s.; and all the witnesses being on the spot, the verdict is immediately obtained.

But, in the last place, what affects my mind most strongly is, that the Court of Exchequer is the proper Court for granting this authority. I go to the fountain head. Is not it the original proper Court at common law? It proceeds in a certain manner; and upon what ground of reason or justice are you to adopt a different mode? If another Court follow the correct mode, should not that make you follow their example? Is it not the more cautious and correct mode?

Therefore I concur in the opinion last delivered, which does justice to all the parties.

I am for refusing the desire of the petition, so far as it goes to the instant recall of the appointment; and I am for authorizing the curator to continue in the management for a short space, so as to enable the party having an interest to apply to the common authority by law.

*Lord President**—I am very sorry that this discussion has taken place, because I shall never think hereafter that there is anything fixed in the forms or in the law of this country. I shall never think there is anything so clear, so fixed in point of form and procedure, that we may not be driven, by long arguments, to say whether it is to continue or not. May 26, 1852.

I never wish to make law; and if I did, I do not pretend to be a better lawyer than the number of great men who have preceded me on this Bench. If the forms that have been prescribed in this country now for near a century, which were introduced by practitioners, and sanctioned by our act of sederunt, and the practice of the Court, be erroneous, let them be reconsidered by the whole Court, and let more constitutional forms be adopted in future, and regulate future cases.

But, while talking of law, justice, and equity, the most arbitrary proceeding is to make, ex post facto, laws and forms that are to have a retrospect, and to regulate particular cases that come before us, according to the views and maxims of individual Judges who happen to be seated on the Bench.

The first question here is as to the point of fact; and with regard to which, there is no difference of opinion. It is whether this unhappy man be fit or not to manage his own affairs. Upon this we are all agreed, that at the present moment he is not so; and therefore that, in the meantime, there is a necessity of continuing this curator. There is no difference of opinion upon that point, and there could not well be, for a more lamentable, melancholy, and humiliating picture of human nature, I never knew.

The little of mind in Bryce, that one of the counsel founded on, was that Bryce bought a pen-knife, and higgled about the price. I have seen a dog do as much. I happen to have seen one which can go and make a purchase. If a penny be given him, he goes and buys a roll, and will not take a halfpenny roll; but if L.1000 were presented to him, it would puzzle him; and a curator bonis must be appointed to that honourable animal, although, like Mr Bryce, he knows the difference betwixt mine and thine.

I happened to be one of the counsel in the case of Sir Archibald Gordon Kinloch, Bart. Look at the printed trial. It was there stated by professional men, that the greatest madman in bedlam might know the difference betwixt right and wrong, if the abstract question were put to him. But Sir Archibald Gordon Kinloch's madness consisted in thinking that his bro-

* His Lordship revised this speech.

May 26, 1826. ther was in a conspiracy against him, and that therefore he had a right to resist him.

That which I noticed a little ago being the only degree of mind given to Bryce by one of the counsel, what was the explanation given by the other, of a disgusting circumstance mentioned by one of the witnesses? Mr Jeffrey said it could be easily accounted for. I allude to the circumstance, that, in broad day-light, and in the face of persons going to the church, this person amused himself by making water in his hat, tasting it, and then putting the hat on his head. Mr Jeffrey explained this as a chemical experiment on his urine. Did Mr Jeffrey intend to laugh at the Court, or to be laughed at by the Court? It may have been meant as a good joke; but if he meant it as an explanation of the fact, he might have spared himself the trouble.

It is impossible to read that proof without being satisfied that Bryce is totally incapable of conducting his own affairs, and that the curatory ought not to be recalled. And the only question is, whether we are to go on, and, of our own power, continue the curator we appointed, or introduce the novelty that has been proposed, in order to force this person into a cognition.

On part of what has been stated on that subject, I do not differ with any of your Lordships. This is not the regular and original mode of proceeding. The regular way of cognoscing, is by an inquest before a jury, who fix certain characters upon the person as to whom evidence is adduced, and certain powers are then given to a tutor.

For anything I know, many of the things stated by my brother may be true. All that follows is, that if Bryce retains any privileges, we do not take away any of those privileges.

Another brother says, Bryce may be capable of marrying, and making a will. If so, let him do it; we have injured his rights the less.

But let us come to the question, whether we have, or not, a jurisdiction in this case? We have no jurisdiction to make tutors at law or tutors dative. But you know, and you have conceded, and, whether or not, law has laid it down, that this is a Court of Equity. It is itself the guardian of those incapable of managing their affairs. If, in a process, we incidentally discover that a party is incapable of taking care of his interest, we have a right to interfere.

I agree also to what was said about the origin and mode in which the jurisdiction came to be exercised by the Court. It was on the abolition of the Scotch Privy Council. But that

body was different from the Privy Council of England. Whether they ever exercised improper power at a certain time, is nothing to the purpose. It was a Court which exercised jurisdiction in such cases as this. Cases of contentious jurisdiction were pleaded before them; and if this case had come before them, they would have taken evidence upon the subject. If a petition was presented, and opposition made, the Privy Council would have exercised their own jurisdiction, not to the effect of giving to any one the power of tutors at law or tutors dative, but that of managing the affairs. And if the powers of the Privy Council in such cases have come to this Court, must not all the particulars of these powers be attached to it? May 26, 1826.

It has been pleaded, as if we were to do everything against the liberty of the subject here. We have liberty, it was said, to lay on the curatory bonis, but no liberty to take it off. The argument was applied to that extent, though your Lordships, I think, have not gone that length.

The jurisdiction did so devolve upon this Court as a matter of necessity, and what does the preamble of your act of sederunt 1730 say? Does it lay down rules for cases never occurring before? No. It proceeds upon the narrative that frequent applications had been made before to the Court, between the Union and that period. Finding the country had called upon them to exercise the jurisdiction, they lay down rules for its exercise. Down to this day, we have proceeded in one uniform course, by one uniform interlocutor, which never has been varied. I have before me an old original application, where the Lords appointed a curator bonis. Not a word about serving the petition on the unhappy person himself. If you think, with Mr Jeffrey, it would be better to make a new act of sederunt for that purpose, I have no objections, though I mentioned the other day what I thought the reason why our ancestors had not adopted the plan proposed. It is this: A brieve is purchased without any prima facie evidence as to the state of mind of the party. It is set forth in the petition in Bryce's case, that there were no relations by father or mother, otherwise they would have been called. But there is prima facie evidence of his condition, by a certificate from a respectable medical person, declaring, 'I certify, 'upon soul and conscience, that having been for several years 'in the habit of professional attendance on the deceased Mr David Bryce, merchant and banker in Edinburgh, I have had 'ample opportunity of being acquainted with the situation of 'his brother, Mr James Bryce; and I am of opinion he labours 'under such a degree of mental imbecility as renders him un-

May 26, 1826. 'fit for being intrusted with the management of his own affairs. '(Signed) JOHN ABERCROMBIE, Surgeon.' I stated a plausible reason why your Lordships, in adopting this form, did not go the length of serving the application on the person himself. But whether right or not, our practice has been established since 1730. My brother mentioned how cautiously our ancestors proceeded. I daresay they did. I hope we always do. But the very first interlocutor must have called their attention to the wording of it; and down from that day to this, the form has gone on, and it must be adhered to till it be altered as a general rule. You have acted upon that principle in a hundred cases.

You remember the case of Aberdeen, where a practice had prevailed as to sasines against the act of Parliament, and the security of the lieges. You saw the mischief and injustice there; and though that was an error entirely of the officers, you saw the injustice of laying hold of a common error in an individual case.

So here the practice may be wrong, but do not visit your own ignorance and inadvertence upon an unfortunate person who relied upon your form.

The only question then is, are you to introduce this novelty of limitation till a regular cognition shall take place?

I agree with all of your Lordships, that our remedy is but temporary, because the instant a tutor at law or dative appears, that moment your Lordships are superseded. But this is no more than what happens in other cases. In the case of minors, the tutor dative is temporary till the tutor at law appears; and the latter is also so till the tutor testamentary appears; but the absurdity is, to hold that in such appointments it is to be mentioned that they are only temporary, in express words. The law knows all these things are temporary.

If we were to rake up the forms of this Court that have been established for near a hundred years, and to go back into original principles, and consider whether a form, if canvassed at the time, might not have been made better, more constitutional, and more advantageous to the lieges, where is the law of this country? We have been accused of vacillating a little as to form in our acts of sederunt, and of not being so steady as in the neighbouring country; but if we are to vary our law and forms, in particular interlocutors, according to the views of particular judges, I do not know what is to become of the law of this country, or what is or is not law.

Our interlocutor implies a temporary appointment. It is said the act of sederunt alludes to persons under a temporary in-

capacity. The duration is known to God alone. It is supposed, in general, that fatuity differs from insanity, from the former being permanent, and the other not so. But recollect that one of the greatest, most beautiful, and sublimest of our poets, was a natural born idiot till nearly twenty years of age. He was not capable of learning to read or write till of that age. And therefore it is impossible to say what is permanent or temporary. May 26, 1826.

But all these things are temporary. The cognition itself is temporary. If this curatory has been laid on according to the practice of this Court, are not you to deal with it as with the cognition itself? You are allowed to take proof and judge of a cognition, this solemn act of a jury. If it be called in question, you may cut and carve upon it. In a reduction, you may judge of it. In a declarator of convalescence, you may judge of it without sending it back to a jury. But here it is said you must send your own judgment to a jury. Now that appears to me extraordinary, that the more solemn proceeding of cognition before a jury, regarding the status of a man, may be reviewed by this Court without a new cognition, while a temporary and less solemn measure, which could not settle some important points as to this man, is to be held so sacred that your Lordships cannot touch it. For as to the wild doctrine, that it is to fly off at once upon the person declaring himself well, ipso facto, that seems to be given up on all hands.

If the law allows you to have power to review, confirm, or set aside the verdict of juries, and you are not to have the minor power of overhauling your own interlocutor, it is strange.

But we heard of this being voluntary jurisdiction—that it is all well while there is no opposition. If so, this limitation of your judgment, as to time, should go into your appointment at first as well as now.

According to this, all you are now called on to do should have been done originally. In the original interlocutor, the appointment should have been, not during the subsistence of the disability, but during some short period, till an opportunity occurred to cognosce. Why not then as well as now? If only from necessity you act, it always existed. If two months is a proper time now, why was not that limitation introduced at first? You have pronounced twenty interlocutors since that question was stirred, appointing curators during the term of disability; but according to the present argument, the appointment ought to be only till the cognition can be effected.

The case of the Duke of Buccleuch was cited, and some pas-

May 26, 1826. sages were read, as if the Court had doubted of the propriety of what they had done in the appointment of a curator bonis. Some individual Judges may have doubted, but the Court did not doubt. They appointed the curator. What they doubted upon, was as to the curator bonis coming and getting his accounts *approved of* during the minority, when there was no person to canvass them on the part of the minor. Most properly they doubted. They had received the accounts for several years. The accounts were signed and audited, and this had not been understood to be an extraordinary proceeding. But the time for exoneration was the end of the curatory. And what your Lordships doubted of in the case of Buccleuch, was, as I have stated, as to approving of the accounts, pending the curatory, without examination on the part of the minor.

Then we were told of the case of Lord Annandale—that good advice was given in that case—that your Lordships should not appoint a curator. The Court did not do it, for there was no application to the Court. But I know when the noble person, the next heir, came to take out the brieve, that very advice puzzled them all in the Court; for the question was how to go on, when Lord Annandale was in England, and could not be produced to the jury. What did the Court do? They acted from the necessity of the case, and gave commission to the Lord Advocate to take an examination in London, and report it to the jury; so that if the learned advice given in that case relieved them in one difficulty, it landed them in another.

But we were told of another very extraordinary mode of proceeding. It was said that this man, though incapable of managing his affairs, had that degree of mind sufficient to enable him to insist on being cognosced. This would be a new purchaser of a brieve. I never heard of the purchaser himself being the subject of such a brieve; and what the jury could make of such a case, I know not. Would it not be novel to see a man come forward and say, I am understood to be an idiot, but, at the same time, I tell you, I have such a degree of mind as to purchase a brieve, and to call upon you to cognosce me? I wish to treat what falls from my brother with respect, but what to make of this argument I know not. A purchaser of such a brieve to say I have that degree of mind that I can understand all the arguments here used as to the different modes of proceeding, and thinking the mode of cognition the most legal, I prefer it, and now call on you, the jury, to find me to be an idiot. It would be an extraordinary jury that would cognosce that man.

But we are told there will be no cognoscing if you do not re- May 26, 1826.
call the curatory, because the curator bonis has got all that he wished. But if a great part of the doctrine held forth were true, it would be his interest to move a cognition; for if Bryce is capable of making a will, it is clear it will not be in favour of the curator bonis. It must be in favour of a person who has made himself curator bonis; and let him try it. It is, therefore, the supposed capability of making a will, which appears to be at the bottom of a great part of this proceeding. If he is capable, let him make it. You will judge of it when it comes before you. Let him marry. There is nothing in your interlocutor to prevent all that. If a freeholder, let him vote. Ours is only a remedial measure for an evil not provided for by the law.

The law does not go upon the notion that it is always absolute madness, or idiocy, or the contrary, that can be in question; for there are ten thousand degrees or gradations in both. The characters of the sane mind are not more diversified than those of the insane, and, in cases where a person could not be cognosced as either furious or fatuous, there is an unfortunate situation in point of fact when a man is incapable of managing his affairs, and that has driven this Court to appoint curators bonis; there being no form of brieve for such a case. For, where there is a brieve of idiocy, and the person is not really an idiot, it is null and void; for no jury, in a service of any kind, can travel out of the brieve before them. They must make a precise answer to the question put to them. The question in the brieve of idiocy and furiosity is, 'Si sit incompos mentis, fatuus et naturaliter idiota, sic quod timetur de alienatione tam terrarum suarum, quam aliarum rerum mobilium et immobilium.' I take upon me to say, that a retour not in terms of that brieve is no retour at all.

But I go a little farther in point of principle; and I doubt extremely if the Exchequer law (if it be law) can allow of a retour of cognition, without noticing who is to take care of the person—who is the nearest agnate. That is not law here. I put this question: who, in point of principle and justice, can have a title, right, and interest, to declare a man an idiot without providing means for taking care of him? Was that ever the law of this country? I doubt it in point of principle. Your Lordships know very well, that even in the brieve of service of heirs, so strict was the form of making an answer to a brieve of inquest, that the general service was originally incompetent. The jury did not stop short in it, and they could not. The whole heads were to be answered, and if not for a special service in land, it

May 26, 1826. could not go on at all. See Appendix in Erskine for the first instance of the kind that was known, Stirling of Keir. It was doubted of extremely, and long after it. But on the head of necessity, you know well, that in one of the most material parts of the law, a precept of clare constat was introduced, superseding the service altogether. Yet, according to the principle now maintained, that could have never been introduced. You have found, by practice, that it is a convenient, proper, useful mode of ascertaining who is next heir. I say the same necessity exists here. There is a distinction when a person is incapable of managing his affairs, and yet, when you could not say, in terms of the brieve of cognition, that he is an idiot. But you are told, leave that to the operation of the common law; for if he grant deeds, they will be set aside; if he marry, the marriage will be annulled. But is it by granting deeds only that a man spends all his fortune? what becomes of contracting debts, &c. As one of your Lordships said, what is the curator bonis appointed for but to take care of his fortune? His personal contracts could not have effect. Allowing this curatory to be good for a week, his personal contracts cannot be good.

We were asked, has he not a persona standi in judicio? If you can find a law-suit by which he is neither to win nor lose, then I have no objection to his persona standi. But if *he is* to engage in any law-suit by which his affairs may be injured, this cannot be allowed by any means. Did you ever see, after such an appointment, that an action could proceed in the person's name without the consent of his curator, unless the action be against the curator himself? We had one this session, where it so happened that a question occurred with a curator, and then you appointed a tutor ad litem. But, in a question with a third party, after the appointment of a curator, his, the curator's, consent must be had; for the bond may be affected by any such action, if he were to lose his case. For the expenses incurred by the other party somebody must be answerable. Therefore, in point of principle, after such an appointment, indefinitely, or otherwise, while the curatory lasts, the person under the curatory has no persona standi in judicio.

I know that, ex necessitate, we must in hoc statu sustain this action; but then, every person who meddles with another's affairs, does so suo periculo. With a cognition staring one in the face, if a declarator of convalescence be brought and failed in, thereby occasioning a great expense, it might be supposed for a moment there was a persona standi in judicio; but when it fails, the expenses must land on the person who usurped the conduct

of the proceeding; otherwise, any officious rascal who brings such action might create a good job to himself, at the expense of the poor idiot, and might pass unpunished. May 26, 1826.

In such an event, you must allow a proof—it is a relevant allegation, but it is made periculo of the person who takes upon him to interfere. Whether your Lordships ought not to require prima facie appearance of relationship, I do not know, but there is not a permanent persona standi in judicio.

We were told by Mr Jeffrey, in a confident manner, that in cases of imbecility from old age, there is no instance of the Court interfering, but that such persons are always left to the easy management of friends, as sons, daughters, or other relations. But there are not only instances of interference in such cases, but the Court has never refused to interfere when applied to by petition.

The distinction was stated between a court having power to take cognizance of the fact, and of the law in such cases; a distinction which would make a curious court of justice. But in the case of Jerdan of Bonjedward, where there was a very contentious long inquiry, whether a person was incapable from age, a case which occurred in 1784, before fifteen as able men as ever sate in this Court, not one of them ever thought or dreamt of this notable point, that the moment opposition is made, we must stop and remit to a jury. I cannot take it off the hands of any one, that, in a question so momentous as it was described to be by one of the counsel, a matter, from his account of it, attended with such danger to the constitution as to make my wig almost leap off my head, fifteen of your predecessors should go blindly into an inquiry into facts, and leave the law behind.

What is it that makes the law, according to this? The more a point has been acted upon, the more it is to be considered as doubtful; the more unchallenged it has been, the more you are to doubt of its legality.

I end where I began, by remarking, that, after what I have heard this day, I never can consider any point of law or form as fixed.

I am clear for adhering to the forms of our ancestors in the case before you. If you think there can be a better mode, let it be introduced by a new act of sederunt; but at present I am for adhering to what has been the usual form these eighty-eight years past. And therefore, I am for refusing this petition and adhering to the interlocutor, continuing the curator during the subsistence of Bryce's incapacity.

There is only one other point remains. Mr Steele, who ori-

May 26, 1826. ginally moved in this case, without authority, must pay the expenses on both sides.

The Court then pronounced this judgment: 'Find it sufficiently instructed, that the petitioner, James Bryce, still remains incapable of managing or conducting his own affairs, and therefore refuse to recall the appointment of the respondent, Walter Graham, to be curator bonis to him during his disability, and so far adhere to their former interlocutor reclaimed against. But with respect to the question of expenses,' ordain Mr Steele to lodge 'a minute on his part, relative to the subject of his personal liability for the expenses incurred on both sides, and also in explanation of his conduct relative to this application, in the course of the proceedings therein.' A minute having been accordingly lodged, and answered, the Court found 'Steele liable in the whole expenses incurred on both sides, upon and in pursuance of the application of date the 3d June 1818, made to the Court in the name of James Bryce.' Steele reclaimed; and Graham, to avoid an objection of incompetency, presented a petition and complaint against Steele, and prayed conjunction with the application for recall; and, in the conjoined actions, to be allowed the whole expenses incurred on both sides. Steele objected to the competency of this complaint, and maintained, that as he had acted merely as agent, and from humane motives, he could not be liable in expenses. But the Court being of opinion that the proceedings had originated with Steele, pronounced this judgment: 'Repel the objections to the competency of said petition and complaint; conjoin the same with the former application in the name of James Bryce, and in the said last-mentioned application refuse the prayer of the reclaiming petition on the part of Andrew Steele, and adhere to their former interlocutor, therein complained of; and in the said petition and complaint, they de novo find the said Andrew Steele liable in the whole expenses incurred on both sides, upon and in pursuance of the application of 3d June 1818, made to this Court in the name of the said James Bryce; and, farther, find the said Andrew Steele liable to Walter Graham in the expenses of the said petition and complaint and procedure, in pursuance of the same.' Steele was accordingly compelled to pay upwards of £300 of expenses. An appeal was then entered by the interdictors and Steele, in so far as they were subjected in expenses; and at a subsequent period Bryce also appealed.

Appellants.—The curatory was constituted and continued, May 26, 1826.
without cognition by an inquest summoned in consequence of a brieve from Chancery, which, when opposition is made, is the only regular and competent mode known in the law of Scotland, for subjecting a person to permanent curatory as an idiot. No doubt the Court of Session can appoint a curator till the issue of trial by inquest, if the circumstances of the case seem to render that temporary expedient requisite for the protection of the person or property of the individual alleged to be fatuous; but the Court are not warranted by any principle or precedent to determine the question of idiocy, especially when opposition is made. It is of no consequence that Bryce had not a male agnate to be his tutor. It would be absurd to suppose that the destitution of qualified near relations should deprive the party of the valuable right of trial by inquest. But even if cognition by inquest and brieve had not been necessary, Bryce was not a fatuous person, in the sense of the word required, to justify reducing him to a state of absolute dependence, and putting him under tutory. Such a proceeding is never authorized in a case of mere weakness of understanding. Besides, if a curator should be appointed, Graham was an unfit person to be continued. If these grounds are well founded, then it follows as a natural consequence, that the appellants—the interdictors and agent, having acted on reasonable views, and in perfect good faith—having in contemplation nothing but what they regarded as a humane and justifiable interference, ought not to have been found liable in any expenses. Above all, there was a manifest injustice in making Steele liable in expenses after he had retired from the suit, and another person, by order of the Court, had become agent—particularly for expenses on both sides. Besides, it was incompetent to award expenses at all under the original action, and the petition and complaint did not remedy the defect.

Respondent.—Bryce was, from his youth, imbecile in his mind. His imbecility increased with his years; and latterly, he became totally incapable of any rational pursuit, or of devoting his attention to any intelligible object. His only known relation is his sister, Mrs Graham, who has taken every care of him. By the law of Scotland, when a person is either furious or fatuous, the nearest male agnate may take out a brieve from Chancery to the Judge Ordinary of the territory where the insane or fatuous person resides, to have the person's incapacity declared by verdict of a jury, and the next agnate served tutor

May 26, 1826. at law to him. But it early was the practice, when there was no agnate, or the agnate did not choose to appear and serve tutor at law, for the Sovereign with advice of his Council, to make gifts of tutory to some proper person. These passed without any trial by inquest, and if, after such appointment, the agnate chose to come forward, his service superseded the appointment. This function in time devolved on the Court of Session, and in order to direct the conduct of parties to be so appointed, and secure a fair administration of the estates confided to them, the act of sederunt, 13th February 1730, was passed, and it has been ever since extensively acted on. The respondent's application, in 1816, was therefore perfectly authorized in point of form, and its necessity has been proved by the evidence led, and the report of the Sheriff, and indeed confessed by the very interdiction under which the appellants themselves placed Bryce. The interference, therefore, of the appellants was quite uncalled for. On the part of Steele especially, it proceeded from the most unjustifiable motives; his conduct throughout, in endeavouring to get up a supposed case of sanity, was altogether exclusive of any pretence of bona fides. He had no authority, and could have received none, from Bryce. This is truly an appeal as to a point of expenses, which is incompetent. It is in vain to try to escape, by raising the question of law, whether Bryce should have been, or still should be, cognosced by a jury. The interdictors were parties to the first application; and as to the costs that followed, it is a rule of Court, that, if a person carry on a suit without proper authority, he must pay the costs; seeing he has chosen to make himself the dominus litis. Steele did not attempt to withdraw until after the Sheriff's report was prepared; he forced on the latter discussion by drawing the petition for appointment of agent and counsel, and thus was just as much the cause of the subsequent, as he had been of the preceding expenses.

The House of Lords ordered, 'that the said cause be remitted back to the First Division of the Court of Session in 'Scotland, to review the several interlocutors complained of in 'the said appeal; and in such review, to have regard only to 'the consideration, that such interlocutors nominate, appoint, 'and continue the said Walter Graham curator bonis to the 'said James Bryce, during his alleged disability, without cog'nition by brieve and inquest, however long that disability may 'endure; and upon so reviewing the said interlocutors, to do

'as to the said Court shall seem just, in either adjudging that May 26, 1826.
'the same ought to remain unaltered, or to be altered: And it
'is further ordered, that the Division to which this remit is
'made, do require the opinions of the other Judges of the Court
'of Session, whether, according to the law of Scotland, in case
'of an alleged continuing disability, the Court of Session hath
'the jurisdiction and power to commit the management of the
'supposed disabled person, or of his fortune, to such person as
'the Court may think proper, not only by a temporary appoint-
'ment for a reasonable time, and until a cognition by brieve
'and inquest shall be obtained, but during any continuance,
'however long, of the alleged disability, without any such cog-
'nition, which opinion the other Judges are required to give:
'And this House thinks proper to reserve the consideration of
'all matters in this and the other appeal, in which John Dick-
'son, Esq. and others, are appellants, and Walter Graham is
'respondent, now before this House, respecting the appellant,
'James Bryce, his interdictors, agents, or others, until after
'such review shall have been had, as aforesaid, under this re-
'mit.'

17th March, 1824.

LORD CHANCELLOR.—This is a case in which the proceedings must be very narrowly examined, before pronouncing judgment. The Court of Session have not been unanimous in their judgment, which is of itself a sufficient reason why the House should pause in giving theirs. But the case is in itself one of great importance, because, in this free country, every man is entitled to be protected in the exercise of his rights of property unless it appears that he is incapable of that exercise, and persons seeking that protection are entitled to just consideration, in any application they may make for that purpose, properly made; but still it is to be seen whether such protection is the object of such application. I may advert to the nature of this application. It is one by the appellants, that is, made by them in this sense, that it is made in the name of a person called James Bryce, with their consent as interdictors. This appointment necessarily implied that James Bryce was capable of choosing them as interdictors, which is a point that ought to be well considered. The object of the application is, to recall the nomination of the respondent as curator bonis to Bryce, made by the Court, which, whether they proceeded in doing so under a sort of necessity that is sometimes felt in this country, of casting round a person in the situation of Bryce some protection until the more regular means of protection held out by law could be afforded, or whether it took place pursuant to the act of sederunt passed in the year 1730, it is certain that the Court had, in practice, made such appointments. I do not, however, see how the cognoscing of

May 26, 1826. Bryce could take place under the proceedings which have been resorted to. As to his capacity, looking to the proof that has been taken before the Sheriff, it appears that he could hardly be stated to have a glimmering of reason. As to the manner in which the Court have found expenses due, the Court, in so far as regards Mr Steele, who is stated to be a respectable man, and writer to the signet, must have acted in the belief that the proceeding was to be ascribed to him from the beginning to the end. It is, therefore, for your Lordships to ascertain whether this was the fact, and whether the proceedings were of a character which should throw these consequences upon him. For these reasons, it appears to me that the proceedings in this case should be examined very narrowly, and which I propose doing, before the day when I shall again sit in this House, and I therefore move your Lordships that the further consideration of this case be postponed until then.

July 4, 1825.

LORD CHANCELLOR.—My Lords, there is a case which I am really very uneasy about. I cannot, at this moment, take on myself to determine whether I shall propose to your Lordships finally to proceed to judgment to-morrow, or whether I shall desire the cause to stand over. It is the case of Bryce *v.* Graham. Upon looking into the books of Scotch Law, it seems to me, according to the text writers, that where a man is conceived to be fatuous, you must, in order to take from him the management of his own affairs, proceed in a certain course. That is by cognition by brieve, and verdict of a jury.

It is perfectly clear, that, for nearly a century, if not more than a century (I cannot give the exact date of the act of sederunt), the Court of Session have admitted of an immediate application to them founded on an affidavit, to appoint a curator to take care of the person and the affairs of the individual, who is the subject of that application. Whether that was originally intended to operate in the way in which similar acts in this country operate, or whether it was originally intended to destroy the necessity of further proceedings, I cannot take upon myself to say, save that it does appear to me, that there are terms in the language of that act of sederunt, which import that it is rather a temporary provision, than one intended to convey permanent authority, under which the man was to be dealt with as a man incapable of taking care of his own affairs; and that his affairs were to be placed in the hands of the other persons, not proceeding to acquire that authority in the mode pointed out. I state that as the general question arising in this case, because, in this particular case, the Court of Session, upon a second application, after the curator was appointed, did remit the question to the Sheriff, and there was an examination of witnesses before him, and that examination concluded not with the verdict of a jury, but by his forming an opinion, and reporting to the Court of Session, that the state of this individual was such as required this care and attention. It was afterwards much discussed in the Court of Session; and upon this point there was a difference of opinion,

among the Judges, whether that proceeding could be a sufficient authority to deal with this individual in the way in which the Court of Session have dealt with him, that is, by continuing the curator, instead of calling upon the person, who had been so appointed curator, to sue out a brieve, and to have the verdict of a jury upon the subject. May 26, 1826.

My Lords, I think that much more attention should be paid, than has been paid, to this question. It may possibly appear that the same care has not been bestowed on the concerns of persons in this situation in Scotland as in England. Your Lordships know that there is no subject to which, in this country, more attention and more jealous care has been applied, than to the question, how authority is to be given to one person, to consider another as under his care, with respect to his property, his person, and so on—on the ground of the imbecility of his mind. The administration of that devolves upon the person filling the office I have the honour to hold, not as Chancellor, but from a special commission, usually indeed given to the Chancellor, to take care of persons in this calamitous situation. When an application is made for a commission of lunacy, the grounds of it are stated in affidavits, which are carefully examined before the commission issues; and all parties have a right to apply to prevent the issuing of the commission. The Court, therefore, which is authorized by this commission to execute this important function, and which ought to be most carefully executed—the Court itself can do nothing except to interpose some temporary care, when that temporary care is found to be necessary, and to send the matter to a jury. It does not grant the commission until a jury shall have found that the person is a party who ought to have that protection afforded to him, and who ought not to be trusted with the management of his own affairs. The caution of the Court does not stop there, because it gives the party a right to traverse that inquisition, and to bring the question before another jury. It affords likewise to persons interested in the decision, a right, without asking the leave of the person immediately interested, to traverse that inquisition. It will appear to your Lordships, from this statement, that it has been felt to be necessary to throw round the individual that sort of temporary care which is supposed to be for his benefit, until there is the decision of a jury. That temporary care has been as well managed as it could be; but the consideration of that subject has led to an improvement in the laws in that respect, by an Act of Parliament, which has been passed in this very session of Parliament.

My Lords, that the act of sederunt I have referred to, has been acted upon very long, is unquestionable. It is uncontradicted in this very case. Whether the instances that have been produced are instances in which the authority was acquiesced in, or whether those cases, to which I am now alluding, were only of a temporary nature, is another thing. The language, as I have before stated, of the act of sederunt, appears to me to import, that the appointment was of a temporary nature. It is contended that a curator cannot be permanently appointed without having a brieve and a verdict by inquisition. On the other hand, it is stated that

May 26, 1826. this act of sederunt has been acted upon, until some of the Judges were satisfied it could not be disturbed. Some of the Judges appear, in this very case, to have renounced the authority of the Court to act upon this act of sederunt, in case the party, who was the subject of the proceeding, chose to insist on the proceeding by brieve and inquisition. Your Lordships will see the very great consequence of the decision of this point; and, I apprehend, in a case of this great importance, the *utmost* care is requisite. I will not pledge myself to the proposing the judgment to-morrow; at the same time, if I find that I can, consistently with my duty, I shall do so; if not, I shall propose that the cause stand over for the reasons I have stated.

My Lords, what I have said hitherto, applies to the case of Bryce *v.* Graham. There is another appeal of Dickson and others *v.* Graham, which my noble and learned friend (Lord Redesdale) attended with me; and that is about the costs. Certain persons having interposed on the part of Mr Bryce, the Court ordered them to pay the costs of the proceedings. It does appear to me that is a question of costs, to be considered, not merely with reference to cases in general, but with reference to a case of this particular nature. This is a question undoubtedly of some importance to the individuals concerned, but certainly, with reference to the other question, of minor importance. At the same time, perhaps my mind may be more influenced than it ought, by the consideration of that case which we have always thought it proper to exercise in relation to persons in this unfortunate situation—that we may not prevent persons applying on behalf of others, who are not able to apply on behalf of themselves—that is a question to which my attention has been necessarily directed in the exercise of the jurisdiction which has been committed to me. We certainly do permit the interference of others; and we receive information on the state of a person who is represented as one, with respect to whom a commission ought to issue. With respect to this case, it may be more easy of decision than the other; but the two cases must be taken, in some measure, together. If it be found, on examining both together, that it is prudent and expedient to dispose of them this session, I shall trouble your Lordships further upon the subject in the course of to-morrow. If I find that the case cannot be properly disposed of, I shall be obliged, on account of the importance of the case, to let it stand till the next session of Parliament. However, I shall endeavour to avoid the necessity of that.

July 5, 1825.

Lord Chancellor.—I have, my Lords, looked into the cases of Bryce *v.* Graham, and Dickson and others *v.* Graham; and I beg leave again to repeat to your Lordships my desire that these causes may stand over until the first week in the next session of Parliament. My Lords, I am extremely anxious to learn, and I shall, in the interval, have leisure to address these inquiries to persons in stations in Scotland, who will be able to give me the information, to what extent this practice has actually gone, of appointing curators to a person who is stated to be of unsound

mind, and proceeded no further, and without having the inquisition of a jury; because it strikes me that it might be a very great inconvenience to many individuals who are in that state of unsoundness of mind, if your Lordships were to pronounce a judgment, which might disturb that great care and attention which are thrown around individuals, who may happen to be in a state of lunacy, by parties who may not be able to substitute any other species of care; but which by private attention could be paid to individuals in that unhappy state. Therefore I do feel the necessity very much, of having a perfect assurance on the subject, and of taking an opportunity of inquiring of those who may have to act upon the opinion that this House may please to form, in giving their judgment; and to attend to the changes which such a judgment may possibly make with respect to the condition of many individuals. If I were obliged to state the only opinion which at present I profess, I should state that I have not been able to form any satisfactory opinion, upon which I could possibly rely, as leading me to think that the Crown has in Scotland what it unquestionably has not in England, namely, the power of taking upon itself the care of any individuals either as to their persons or their property, on the ground that they are of unsound mind, without the verdict of a Jury. That this was the old law of Scotland, appears to be clear upon their books; and how far an act of sederunt could alter the law in that respect, appears to me to be a very important question; for if the Crown could not assume the care, except for temporary purposes, of the person and estate of an individual, without the case being fully inquired into—if it could not assume the care of the person and property of an individual to whom unsoundness of mind was imputed, without having, as a foundation for the exercise of that power, the verdict of an inquest, I cannot help doubting whether there does exist in any Court, either in that country or in this, a power by its own authority—I say by its own authority—to take upon itself a jurisdiction over the person and property of an individual, upon that ground, without the intervention of a jury. It seems to have been formerly the law of Scotland (unless I have been misinformed), previously to the act of sederunt, which is said to be the authority upon which these curatories are granted, and with reference to which they have been supposed not only to be granted for the purpose of temporarily taking care of an individual until an inquest could be taken, to give an authority to appoint another species of care over the individual, but for the permanent care of the individual. I cannot help doubting whether an act of sederunt could go the length of that, but for the reason I have stated, which I think is a reason of feeling, as well as a proper reason, and one that ought to be attended to. I shall inquire into the subject, more especially as, in this individual case, I do not think that the delay will be attended with prejudice. May 26, 1826.

With respect to the other cause of Dickson and others *v.* Graham, I mentioned to your Lordships yesterday, and I take the liberty to mention to-day, that I think it ought to be very carefully attended to, how far, on the part of persons in this unhappy state of mind, the application

May 26, 1826. to tribunals, which must, by their regulations under the authority of the Crown, take care of the persons and of the property of individuals of unsound mind—how far it may be prudent to discourage fair and reasonable applications made by persons having really no interest, but an interest which tenderness and affection induce, and who are only desirous to have the persons and property taken care of—how far your Lordships will prevent them, by holding that if their application be not well founded, or turns out to be improper, they shall be subject to great costs and expenses. I am ready to admit, that there may be cases where, in order to guard against persons making improper applications, no costs should be granted; but, in the present case, if the forms of the Court of Session would permit it, I should apprehend that there might a very material question arise with respect to the costs; whether there might not be a distinction taken between the expenses that have been incurred in the proceedings, and other expenses that have been incurred. For it does appear to me, that there is a very considerable difficulty in saying, after this matter had proceeded up to a particular period, that the persons who now appeal in the other cause, should, out of their own pockets, be liable to those expenses—the Court itself appointing another agent and another counsel to act,—who, in the subsequent proceedings, may reasonably contend that they are discharged altogether from the situation in which they were placed, when they originally made the application to the Court; and who, nevertheless, are subjected in the costs and expenses, not only of what took place when they were engaged in the business, but the costs and expenses after they had ceased being engaged, and had withdrawn from it.

These observations, I hope, will satisfy your Lordships as to the propriety of the delay which will be occasioned, and that you will consider them, in some measure, as reasons explaining why it appears to me that it would be perfectly right not to proceed in the judgment of those cases at the present moment—and why I beg to move your Lordships that these cases should stand over till the first week in the next Session of Parliament.

May 26, 1826.

LORD CHANCELLOR.—My Lords, I have now in my hand the papers which relate to a case which appears to me to be of very great importance indeed. I should rather say several cases,—but they all relate to one point, which I look upon as a point of very great importance,—I mean the cases in which Mr Bryce is the appellant, and those other cases in which certain persons, who were what is called, in the law of Scotland, his interdictors; and likewise a Mr Steele, who was both an interdictor, and likewise a person who interfered as a man of business in the concerns of this Bryce, were parties.

My Lords, the question which I take the liberty to state as a question of importance, is this, Whether the Court of Session, which, as it appears to me, has undoubtedly a right to appoint, in the case of a person of imbecile mind, a curator bonis ad interim, that is, until some other pro-

ceedings of a judicial nature can be had,—has also a right to change the May 26, 1826.
status and condition of the party, upon its being represented to them that he is of imbecile mind, without following that up by a cognition before a jury. My Lords, there is perhaps no question that one can represent to one's own mind, as a case of greater difficulty, than under what authority a man should be treated as a man incapable of managing his own affairs, and separated from the world in that respect;—namely, that he is to be considered of such weak mind, that he ought not to be trusted to do any one action for himself.

My Lords, on looking into that which is stated in the opinions of the learned Judges, I find that I am obliged likewise to represent to your Lordships this case as a case of very great difficulty and importance, on account of the different opinions held upon it in the Court below. Two of the Judges state,—and repeatedly one of them, (my Lord President,) —that he must admit that he knows nothing whatever of the law of Scotland, if they have not the authority which has been exercised in this case. I should tell your Lordships, that the first interposition in this case is upon the mere certificate of a medical man; not a judicial inquiry by affidavit, but upon a mere certificate of a medical man. The Court thought proper, afterwards, to remit the matter to a person, who, I believe, now holds the office of Lord Advocate of Scotland, to examine witnesses with respect to the state of mind of this individual; and your Lordships have, in this bundle of papers, a very long statement of what those witnesses deposed to, with respect to this person's state of mind. They were very much pressed to have this matter sent to a jury; and the Court seem to have been very much divided upon it;—some of the Judges holding most clearly, that they had no right whatever to appoint a curator bonis, who should continue in that situation, without further inquiry, and without further information upon the subject than that which they had received;—others of the Judges holding that their practice had been, for a hundred years, and upwards, to take the authority which the Court was then administering upon them; and that, in truth, it would have been an entire change of the law of Scotland, if the opinion of the former Judges were supposed to be right. These opinions are delivered at great length, and some of them certainly are very worthy of grave consideration.

Now, my Lords, I can have no doubt that your Lordships will concur with me in thinking, that a case of this nature ought to be determined after the fullest information this House can receive. Our course in England is clear; and I doubt very much, after all I have read and seen upon this subject, whether, by the law of Scotland, notwithstanding what has been stated in the papers to which I allude, unless it has been changed, his Majesty, as parens patriæ, has not the care of those who cannot take care of themselves. That duty he cannot personally exercise; and therefore he remits the discharge of that duty to such persons as he may think worthy of being considered able to execute it. It is usually here placed in the hands of the person to whom the Sovereign has delivered the Great

May 26, 1826. Seal of England—usually, I say, not necessarily. It is quite obvious that several of his subjects may be in a state in which it is absolutely necessary to throw around them protection, before you can have the opinion of a jury upon the question whether they are or are not of unsound mind, and unable to take care of themselves. The person to whom this jurisdiction is committed, by special commission, therefore, never hesitates to interfere temporarily for the purpose of taking care of those individuals, until it can be seen, upon the acknowledged authority of the verdict of a jury, what is the real state of their mind. That temporary authority he does not exercise, except upon receiving information which makes it his duty to interpose even to that extent; and your Lordships are very well aware, that in this part of the united kingdoms, even after that a jury has, to use a Scotch phrase, cognosced a man of imbecile mind, he has a right himself to traverse that finding, without asking any one's leave, unless a certain length of time has occurred; and with respect to any individuals who suppose their interest affected by the acts he has done, they have a right to apply to the Great Seal for leave to traverse that inquisition; and that leave is never refused in any proper case. Every care is taken in our law, before a man can be said to be permanently fixed in a state in which the whole management of his affairs is delivered over to other persons; and I think I can see, in the law of Scotland, abundant reason for saying that the Court of Session have, as I think they must have, a right to appoint a curator ad interim, if I may so express myself: That is, that they may take upon themselves to appoint a person to take care of an individual who cannot take care of himself, until they can have an opportunity of inquiring by a jury what is his state, and whether he ought to be permanently treated, as in a state in which he is not capable of managing his own affairs. But, upon looking at the books, to which here alone we can have resort, I confess I do not find an authority for saying that the Court of Session can, without a brieve and inquest, exercise the power which they have exercised in this case. My Lords, I do not mean to say that they have not that power; because the very nature of the question, the difficulty of the question, and the importance of the question, make it extremely fit that we should be cautious what we say upon such a subject; but recollecting the extreme importance of the subject, and looking at what are called the authorities in the judgments of those Lords of Session, who thought that they had the authority, it does appear to me that it would be proper for your Lordships to remit back to the Court of Session, to review the interlocutor, which in substance refuses the claim of having a brieve and inquest; and then to reserve the consideration of the other cases till you have the opinion of both the Courts, including likewise the Lords Ordinary, upon this question, which is of so much public importance. And I have myself, my Lords, no difficulty in saying, that, as at present advised, if it should turn out to be the clear opinion of the Lords of Session of Scotland, that they have this general authority, as my mind is at present affected with the importance of this question, I should be very much disposed to submit to your Lordships something in

the shape of a bill, to declare, by act of Parliament, in what manner this authority shall in future be exercised. I am desirous of putting it in this way, not because, my Lords, I should be unwilling to express my own opinion, if it was a case in which the expression of that opinion might not do a great deal of mischief, in the meantime, before a question of this importance can be regulated, in the only way in which it can be usefully regulated; because, if your Lordships were now to come to a decision, that this curator bonis should no longer act; that is, if your notion of the law should be, that there ought to have been a brieve and inquest, and if the learned Judges who say that this has been the practice of Scotland for a hundred years and upwards, are right when they state that fact, it cannot but be that your decision, to the effect that I have mentioned, would not only put an end to this curatorship, but to all curatorships that exist at this time in Scotland; and which, existing in Scotland, there must be, in all human probability, so many of them, that it would be attended with very great inconvenience to interfere brevi manu, in a manner that would affect so many individuals as would, in all probability, be affected by it. May 26, 1826.

My Lords, having said thus much, I refrain from stating anything with respect to the questions which relate to the judgments that have subjected these interdictors, Mr Steele and others, to costs and expenses; and which, so subjecting them, are likewise made the subject of appeal to your Lordships. How they may be disposed of, after you have had the opinion of the Court of Session upon the principal point, will be matter for your Lordships' discussion and decision. I own it appears to me, unless it can be proved that they had some improper object in thus interfering, to be rather a hard way of dealing with persons who are interposing for the purpose of protecting an individual from being placed in a state in which they thought (at least so they pledge themselves) that he ought not to be placed at all. It is conceived to be a matter of very considerable importance, (and it has always been so in this part of the country,) not to be too unwilling to receive that information, with respect to the state of those unhappy persons, which it may be necessary for you to have, in order to give them the relief they may require; and one circumstance which has made me hesitate about humbly advising your Lordships to remit the case, to which I have before alluded, is, that I do not know but that the remit in that point of view might be inconvenient, by its subjecting the individuals to costs, which assuredly they ought not to pay, if the remit goes from this House.

There is another question which I think will deserve some consideration too, and that is this: Some of the Lords of Session express a doubt as to who is to sue out this brieve. The curator is generally the next of kin. The man himself, they say, cannot sue out the brieve; but then those Lords who think there ought to be a brieve, express their opinion in this way, That the curatorship of the goods should be committed only for a limited time; and then if the individual who is made the curator of the goods for a limited time, does not think proper to sue out the brieve and inquest, if that brieve and inquest be necessary by law, that then he

May 26, 1826. should no longer be continued the curator bonis. Still there arises a difficulty to which regard must be had: If he is not the person, what other person is there who will be entitled to sue out that brieve and inquest? My Lords, I certainly speak without sufficient information; but I cannot believe that the subjects of his Majesty in Scotland who may unfortunately be visited by this dreadful malady, are in a state in which it is the duty of no one to interfere; and I apprehend it may be very well worthy of consideration, whether my Lord Advocate of Scotland is not a party entitled to interpose in such cases. I have made these general observations, for the purpose of asking your Lordships' permission to word an order of remittal of the case of Bryce v. Graham to the Court of Session in Scotland, to the same Division before whom it had been heard, desiring them to take the opinion of the other Chamber, and likewise of the Lords Ordinary—that is, the whole of the Fifteen Judges; reserving the consideration of the questions in the other appeal, until we have the opinion produced to us which that remit is calculated to bring before this House.

Appellant's Authorities.—4 Erak. Inst. 3. 6.—2. 7. 48. 53.—1. 7. 49.—A. S. Feb. 13, 1730. (1475, c. 67.)—Balfour's Practics, c. 7.—Craig de Feudis, 1. 12. 29.—Stair's Inst. 4. 3. 7.—1. 25. 6.—Mackenzie on the Statutes, (1475, c. 67.)—Bank. Inst. 1. 7. 9. and 4. 14. 11.—Lock. July 29, 1638. (6278.)—Christie, Feb. 13, 1700. (6283.)—Blair, June 18, 1748. (13217.)—Stuart, Jan. 21, 1663. (6279.)—Moncrieff, Feb. 22, 1710. (6286.)—Ederline, Feb. 27, 1740. (Elchies.)—Haliburton, June 1791. (16379.)

Respondents' Authorities.—A. S. Feb. 13. 1730.

SPOTTISWOODE and ROBERTSON—ALEXANDER MUNDELL, *Solicitors.*

No. 37.

JOHN DICK, Esq., Appellant.

JOHN DONALD, and (by revivor) DONALD CUTHBERTSON, Trustee on the Sequestrated Estate of James Corbett, Respondent.

Sale.—Husband and Wife.—A party having purchased a property, and taken the title in name of his wife, and thereafter become bankrupt, and fled the country; and his wife having, in his absence, conveyed the property to the trustee for his creditors, who exposed it to sale, under articles of roup, by which he bound himself to execute, and deliver to the purchaser, a valid, irredeemable disposition; and the purchaser having objected that the title granted by the wife was inept, and refused to pay the price; and the Court of Session having found that the trustee was not bound, at the expense of the bankrupt estate, to make any addition to the title, but only at the purchaser's expense—Held, (reversing the judgment,) that the trustee was bound to give the purchaser a good and valid title, and that the one which he offered was not good.

Dec. 12, 1826. 2D DIVISION. Lord Reston.

IN April 1813, James Corbett purchased from Andrew M'Kendrick five acres of land near Glasgow, at the price of L.800; and took the title in name of his wife, who was infeft.

On the security of this property and his own personal bond, Dec. 12, 1826.
Corbett afterwards obtained loans of money to the extent of L.1200, for which the heritable bonds were executed by his wife.

Corbett built a house on the property, and about two years after the purchase, he became bankrupt, absconded, and fled from the country. The estate having been sequestrated, Donald was appointed trustee, and prevailed on Mrs Corbett to grant a disposition in his favour of the property. This deed proceeded on the narrative, that Corbett had bought the lands, and taken the disposition to her, at a time when he was insolvent; that she was satisfied that the money paid as the price, and in erecting the buildings, belonged to his creditors; and as Corbett had been ordained, under the sequestration, to execute a conveyance in favour of the trustee, it was just and proper that, as the title had been taken in her name, she should denude and grant the requisite deeds to Donald. She accordingly, on the 9th April 1816, conveyed the lands to him, with full power to sell, and apply the price as directed by the bankrupt statute.

Thereafter, the trustee exposed these subjects to sale, by public auction, at the upset price of L.1300. By the articles of sale it was stipulated, that the purchaser should be bound to pay the price, under deduction of the amount of the heritable bonds granted by Mrs Corbett, 'as proprietrix of the said subjects,' which were to make part of the price, and be payable by the purchaser to the creditors in the bonds, to save the expense of the stamp and disposition, and also to execute and deliver at his own expense, within ten days after the roup, a bond for the price.

The articles then stated, that upon these conditions being performed, 'the exposer shall be bound to execute and deliver a 'valid irredeemable disposition of the aforesaid subjects, as described in her own or constituent's title thereto, in favour of 'the purchaser, his heirs or assignees, and containing obligation to infeft, to be holden a me under the burden of the feu-'duty payable to the superior, in terms of the title-deeds of the 'property, and particularly of the feu-duty specified in the disposition of the subjects, by the said Andrew M'Kendrick, in 'favour of the said Janet Gillies or Corbett, and the instrument of seisin thereon in her favour; and the said disposition in favour of the purchaser, shall also contain procuratory 'of resignation, &c.; and along with the said disposition, the 'exposer shall also deliver to the purchaser the foresaid dispo-

Dec. 12, 1826. 'sition and instrument of seisin thereon, in favour of the said 'Janet Gillies or Corbett, and a disposition by her in his, the 'exposer's, favour, which are all the title-deeds of the property 'in his custody.' It was also declared that the trustee, before payment of the price, should produce a search of encumbrances affecting the subjects since the purchase from M'Kendrick, and that all questions which might 'arise between the exposer and 'purchaser, relative to the sale and subject matter of the articles 'and minutes of the roup, or implement hereof,' should be referred to arbitration.

Dick, who had been educated to the profession of the law, and afterwards was admitted as an advocate at the Scottish Bar, became purchaser, under these articles and conditions, at the upset price. Having discovered that the disposition by Mrs Corbett to the trustee had been granted without the consent of her husband, and without her judicial ratification, he refused to accept of a disposition offered to him by the trustee, or to grant bond for the price, on the ground that the title which the trustee held from Mrs Corbett, was not valid. A charge of horning having been then given to him to grant bond for the payment of the price, he brought a suspension.

The Lord Ordinary found the letters orderly proceeded, and decerned; and thereafter, on the 11th March 1818, on considering a representation, with answers, his Lordship, 'in re-'spect of the terms of the articles of roup, and whole circum-'stances of this very special case, found, that the respondent is 'not bound, at the expense of the bankrupt estate, to make any 'addition to the title offered by him; but that he is bound, at 'the risk and expense of the representer (Dick), to concur in 'any supplementary title he may wish to have executed; and 'with this explanation, refused the desire of the representation, 'and adhered to the interlocutor represented against.'

Dick having reclaimed, the Court, on advising his petition, with answers, adhered, and found him liable in expenses; and to this judgment, on advising a reclaiming petition, with answers, they again adhered, on the 23d of June 1820.*

Thereafter, a deed of ratification, by Corbett, and a judicial ratification by his wife, were obtained and produced in process.

---

* Not reported.—In the appeal case for Dick it is stated, 'that a considerable dif-'ference of opinion prevailed among their Lordships at pronouncing their first interlo-'cutor, two of their number having been of opinion against the interlocutor of the 'Lord Ordinary, and three in favour of it;' and, 'at pronouncing the last interlo-

Dick appealed. Dec. 12, 1826.

Appellant.—The trustee has not implemented his obligation in relation to the appellant's purchase. The appellant is not barred by anything contained in the conditions of sale, from objecting to the titles. If he had been put upon his guard that the titles were defective, and it had been conditioned that the purchaser should, beforehand, satisfy himself in that matter, that would have been a contract, which would have bound both parties. But that is not the case here. On the contrary, the trustee, as exposer, became bound, in express terms, to deliver to the purchaser a valid irredeemable disposition of the subjects; and if difficulties did occur, a reference was appointed to arbiters. But the disposition is utterly defective. It was granted by Mrs Corbett alone, and not with the advice, or by the consent, of her husband. Neither was it judicially ratified by her. But a disposition by a married woman without consent of her husband is inept; and consequently, the conveyance to the trustee is null and void; and therefore, he could not, in terms of the articles of sale, grant a valid irredeemable disposition. If so, then, as the trustee, at the time of the sale, could not grant a valid title, the appellant cannot be bound by his purchase; and therefore, the husband's supervenient ratification could not have the retrospective effect of making the disposition valid, at least the appellant could not be obliged to accept of it.

Respondent.—The appellant was quite aware of the nature and description of the titles that would be given to him, and he agreed to accept them. There is no ground for the distinction between the case when the purchaser undertakes to satisfy himself as to the titles, and where the nature of the titles is distinctly specified. In neither case can the purchaser be permitted to resist payment because the titles are not perfect. In both, he is equally bound to satisfy himself before he becomes purchaser. But the titles are unexceptionable. In the peculiar circumstances in which the present question originated, even had the property been bona fide Mrs Corbett's, her disposition to the trustee would have been valid. The taking the disposition from the seller to her was a fraud on the hus-

'cutor, the two Judges who had been of opinion against the interlocutor of the Lord 'Ordinary were absent, one from indisposition, and the other attending his duty as 'a criminal judge, in another place.'

Dec. 12, 1826. band's creditors, and the deed could have been reduced. Therefore, Mrs Corbett was only acting with common honesty when she granted the disposition to the trustee, who could easily have reduced it, and obtained a special adjudication, which he offered to do, but the appellant declined to accede to the proposal. Besides, as Corbett was out of the kingdom, the deed of his wife was perfectly effectual; and to remove all objection, his ratification of it, and that of his wife, judicially, had been procured and tendered to the appellant, so that all ground of objection was removed.

The House of Lords ordered and adjudged, 'that so much of 'the said interlocutor of the 11th March 1818, as found that the '"respondent is not bound, at the expense of the bankrupt's '"estate, to make any addition to the title offered by him, but '"that he is bound, at the risk and expense of the representer '"(appellant), to concur in any supplementary title he may '"wish to have executed," be, and the same is hereby reversed; 'and it is declared, that the respondent is bound to make the 'representer a good and valid title; and that the title offered 'to the representer is not such a good and valid title; and with 'this reversal and declaration it is ordered that the cause be 'remitted back to the Court of Session in Scotland, to review 'the several interlocutors complained of in the said appeal, and 'to do therein as is consistent with this reversal and declara-'tion, and the practice of the Court in proceedings of the na-'ture of that in which the interlocutors have been pronounced.'

Nov. 29, 1826.

LORD CHANCELLOR.—With regard to the question upon the merits made under this appeal, I have no manner of doubt (unless my mind is affected by the eclipse of to-day) that this gentleman is entitled to a valid title. Our rule of law is, in England, that a person who purchases an estate, has a right to a good and valid title, unless it shall be as clear as the sun at noonday that he had waived his right.

In the present case, the first interlocutor I see bears date in 1817, and the last in 1820; and the whole matter at stake is a property of the value of £1900. It is, therefore, highly desirable that it should be concluded.

The real question in this case is, whether the appellant has waived his right to a good and valid title. I think the opinions of the Judges are quite enough to show that it is not a good title. The first Judge says, in the notes handed up to us, that the title is not what it ought to be; another says, that he doubts the title, but the danger of eviction is not immediate; a third (Lord Bannatyne) is of the same opinion with the two

former, and by these Judges the case at that time was decided in favour of the respondent. The other two Judges, the Lord Justice Clerk and Lord Robertson, concurred that the title was bad, and were of opinion with the appellant. Dec. 12, 1826.

I can see nothing in the articles of roup to take away the appellant's right to a good and valid title. The articles bear, that the appellant is to receive a valid irredeemable disposition of the premises. This must be made by some person who had right to grant it. In regard to the deeds mentioned in these articles, though it was specified that these were the only deeds to be delivered over, that had no operation in regard to the purchaser's right to demand that the seller should show a good title.

Upon the point of form stated by some of the Judges, and founded on by the respondent, I shall look very narrowly through the proceedings, to see if this point of form prevents us from deciding at present upon the merits. I shall endeavour to give my judgment thereon to-morrow, at the meeting of the House.

Dec. 12, 1826.

LORD CHANCELLOR.—My Lords, there was a case, Dick v. Donald, argued at your Lordships' bar a short time ago, and in the course of the argument, a difficulty arose, whether this House could, according to the practice of the Court of Session, give any declaration as to the title of the parties when it was allowed to depend on what was termed articles of roup, or whether the Court of Session ought not to have asked for a bond of caution. On looking into the interlocutor of the Lord Ordinary, which must be considered as confirmed by the subsequent interlocutor of the Court of Session, I perceive the Lord Ordinary finds thus, 'That the respondent is not bound, at the expense of the bankrupt estate, 'to make any addition to the title offered by him, but that he is bound, 'at the risk and expense of the representer (Dick), to concur in any sup-'plementary title he may wish to have executed.' Now, if it be the opinion of this House, as I apprehend it to be, that this declaration in law is wrong, there can be no difficulty in reversing this declaration of law, stating what is the law upon the true construction of these articles of roup, and in that shape send back the case to the Court of Session in such a way as to prevent the expense the parties are likely to be put to.

Appellant's Authorities.—Rowan, Nov. 24, 1769, (14178.)—Nairn, June 13, 1676, (14169.)—Lockhart, 13 July, 1742, (14176.)—Tait, 20 Dec. 1743, (14177.)—Reg. Maj. 1. 30. 6.—Quon. Attach. 21. 1.—Craig de Feud. 1. 12. 26.—Stair's Inst. 1. 4. 13, &c.—Bank. Inst. 1. 5. 67.—Ersk. Inst. 1. 6. 22, &c.—Bullion's, Dec. 4, 1793, (6149.)—Dunbar, Feb. 12, 1566, (6001.)—Scott, Aug. 10, 1776, (6108.)—Ersk. Inst. 4. 1. 33.

Respondents' Authorities.—Churnside, July 11, 1789, (6082.)—Ersk. Inst. 1. 6. 27, &c.—Clark, Jan. 31, 1717, (5996.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNEL, *Solicitors.*

No. 38. HUGH ARBUCKLE, Appellant.—*Adam—Keay.*

CAMPBELL INNES, Respondent.—*Spankie.*

Mandate.—Burgh Royal.—A constituent member of a Town-Council, present at an election of Magistrates, having gone abroad; and a petition and complaint having thereafter within the statutory period been presented in his name; and it being alleged that he had granted no mandate authorizing this to be done, and no mandate having been produced, Held (affirming the judgment of the Court of Session,) that the complaint at his instance was incompetent.

Feb. 22, 1827. 1ST DIVISION. Lord Medwyn.

ON the 26th of November 1825, Hugh Arbuckle, one of the constituent members of the meeting for the annual election of Magistrates and Councillors of the burgh of Queensferry, held on 29th September 1825, presented to the Court of Session a petition and complaint, complaining of certain wrongs and abuses committed in the course of the election, and praying that the election should be found illegal. M'Bain, a deacon of tailors of the same burgh, was also a complainer, but the question which arose had no relation to him.

Innes, and the other constituent members of the meeting of election, objected, that as Arbuckle had left Scotland a day or two after the Michaelmas election, on a foreign voyage, was furth of the kingdom at the time the complaint was presented, and had left no written mandate for presenting the complaint, it could not competently be insisted in at his instance, and in his name; and as the statutory period within which a complaint could be presented was expired, the election could not be questioned by him.

On the other hand it was stated, that Arbuckle was a native Scotsman,—had been long domiciled as a resident burgess at Queensferry,—was the master of a trading vessel, in consequence of which he was occasionally absent,—that the vessel was his own property, and he also was owner of heritage in the burgh,—that soon after Michaelmas 1825, he sailed with his vessel to a port in the continent, not animo remanendi, but intending to navigate his ship home, when the object of the voyage was accomplished,—that, before his departure, he had given verbal instructions to present the complaint; and that accordingly, on the 7th of November, he wrote from Dieppe to his professional agent,—'I have been detained here with contrary winds this 'fortnight. I expected, when I saw you, to have been on my 'passage home from Rotterdam before this time. I have to go

'there for a cargo, and I hope not to be long detained. Prefixed Feb. 22, 1827.
'I send you a memorandum about our Michaelmas election. I
'expect that you have got the minute of election. Should you
'want any farther information on the subject, write me to the
'care of D. B. and Son, of Rotterdam, and I will attend to it
'immediately; and should it be necessary for you, I will ra-
'ther come home from Rotterdam by the way of London as
'you should be disappointed. I have no doubt that Deacon
'M'Bain will allow you to use his name in the petition and
'complaint. Mr M. could speak to him, or I could send word
'over from Rotterdam to my mother, for him to go into Edin-
'burgh to speak to Mr M. Perhaps in the petition and com-
'plaint it might be as well to conclude for the penalties of
'L.100 for each person voting who may be found disqualified.'
The case having been remitted to the Lord Ordinary for preparation, his Lordship, after doing so, made avizandum to the Inner-House on the question of title; and the Court, on the 11th March 1826, dismissed 'the petition and complaint, in so 'far as it is made by Hugh Arbuckle, and decern; and find him 'liable in one half of the expenses incurred in process, in terms 'of the statute.'*

Arbuckle appealed.

Appellant.—As a constituent member of the Michaelmas meeting 1825, for electing Councillors and Magistrates of the burgh of Queensferry, the appellant had a good title to complain of any wrong committed by the majority of the meeting. The appellant was obliged, soon after that meeting, to proceed to sea; but, before he sailed, he gave verbal instructions for presenting the petition and complaint in question at his instance, and repeated these by a letter from Dieppe, referring to these instructions. The temporary absence of the appellant did not create any necessity for a mandate. The appearance of his counsel presumed the existence of a mandate. This is a very different case from that of a foreigner, or of a Scotsman domiciled abroad, instituting a suit in a Scotch court. There a mandatory (although even that, in some cases, may be otherwise supplied) is requisite. But the present is the case of a Scotchman domiciled in Scotland, being absent for a short and temporary purpose, and with the view of speedily returning. The presumption that he has given authority to his professional agent to act in his name, cannot be challenged. The utmost

* See 5 Shaw and Dunlop, No. 253.

Feb. 22, 1827. the respondent could require would be, that on his return he should acknowlege the proceeding. The action, therefore, having been raised within the statutory period, the appellant has an indisputable title to pursue; and to be allowed to enter into the merits.

Respondent.—The election of the magistrates could only be competently challenged by a summary complaint within two calendar months. The petition and complaint, although presented in time, in name of the appellant, was not at his instance. He had already left Scotland, and had given no authority or mandate for any such proceedings. Even if he had left general instructions of this nature, they would not have been sufficient. There must have been a written mandate for this particular purpose, the holder of which should have appeared and sisted himself as mandatory. The appellant did not offer to prove his alleged parole instructions; and the letter from Dieppe did not amount to a mandate in favour of the party written to, or of any other person. Had the Court been aware of these circumstances when the complaint was moved, the petition, instead of being ordered to be served, would have been dismissed. Being therefore originally null, and incompetent, as in the name of the appellant, but not at his instance, and the two calendar months having expired, the most express sanction now given by the appellant to all that was done in his absence cannot be of any avail.

The House of Lords ordered and adjudged 'that the said 'petition and appeal be, and is hereby dismissed this House; 'and that the said interlocutor, so far as therein complained of, 'be, and the same is hereby affirmed: And it is further ordered 'that the cause be remitted back to the Court of Session in 'Scotland, to proceed therein, with respect to the complaint 'made by James M'Bain, as shall be just.'

Lord Chancellor.—My Lords, in the cause in which Hugh Arbuckle was appellant, and Campbell Innes and several other persons were the respondents, the question was, whether Mr Arbuckle, who was absent at the time, had given authority for the institution of certain proceedings upon the election of which he complained; and the case having been heard before the First Division of the Court of Session, the Court expressed their opinion in the following interlocutor—(his Lordship then read it.) The judgment expressed in this interlocutor proceeds upon the opinion of the Court of Session, that it was necessary that Mr Arbuckle should prove that he had given a mandate to institute the suit.

My Lords, this case, in my judgment, affords a question of very great importance in every way of considering it; but, in a case of this nature, in which it appears to me that the Court of Session, in all human probability, must understand a matter of practice of this sort better than we can understand it; and there being great inconvenience, either in holding that they are right, or that they are wrong, it does not appear to me that it is possible for me to represent to your Lordships that I can form so clear an opinion that they are wrong as to take upon myself to advise your Lordships to reverse the judgment. I should, therefore, propose to your Lordships, that the judgment should be affirmed, and that the cause should be sent back to the Court of Session, to proceed as to the matter of James M'Bain, the other party, according to the reservation in the interlocutor, as they should be advised. Having stated this as my judgment upon this extremely difficult question, and as there are great difficulties, in the one or the other view of the case, it does not appear to me that this is a case in which your Lordships ought to give costs. Feb. 22, 1827.

Appellant's Authorities.—Stair's Inst. 1. 12. 12.—Ersk. 3. 3. 33.—O'Haggen, July 31, 1761. (4644.)—Hope, June 10, 1797. (4646.)—Ivory's Forms, Vol. 1. p. 162.—Scott, Jan. 29, 1823.—(2 Shaw and Dunlop, No. 152.)—Ewing, Nov. 28, 1823.—(2 Shaw and Dunlop, No. 521.)

Respondents' Authorities.—7. Geo. II. cap. 16. § 7.—16 Geo. II. 2. § 24.—14 Geo. III. c. 81.—Bell's Election Law, p. 493.—Campbell, June 24, 1814. (Fac. Col.)—Bank. Inst. 4. 3. 26. &c.—Stewart, Feb. 3, 1681. (353.)—Butler, July 31, 1798. (356.)—Dundas, July 20, 1780. (5837.)—Davidson, July 6, 1802. (8842.)—M'Innes, June 3, 1813. (Fac. Col.)—Cameron, Feb. 28, 1818. (Fac. Col.)—M'Coll, Jan. 17, 1822. (1 Shaw and Dunlop, No. 284.)—Taaffe, Feb. 22, 1822. (1 Shaw and Dunlop, No. 387.)—Hamilton, May 18, 1822. (1 Shaw and Dunlop, No. 477.)—Gibson, Dec. 17, 1822. (1 Shaw and Dunlop, No. 90.)—Scott, Jan. 29, 1823.—(2 Shaw and Dunlop, No. 152.)—Grant, Nov. 30, 1825. (2 Shaw and Dunlop, No. 190.)—Paxton, 1749. (16121.)—Gray, Feb. 24, 1804. (App. No. 15. Burgh Royal.)—Speirs, March 3, 1826. (4 Shaw and Dunlop, No. 341.)

JAMES CAMPBELL—RICHARDSON and CONNELL, *Solicitors.*

JAMES GARDNER and Others, Appellants. **No. 39.**

JAMES REEKIE and Others, Respondents.

Burgh Royal—Set—Usage.—The Court of Session having found that there was not sufficient usage established to modify the written set of a Royal Burgh, the House of Lords remitted to make further inquiries.

BY the set of the burgh of Kilrenny, dated 5th September 1710, the election of Bailies and Treasurer is declared to proceed in this manner:— March 23, 1827. 1ST DIVISION.

'Three days before the third Thursday of September, which 'is the day fixed for the said election, the bailies cause their

March 23, 1827. 'town officer, by tuck of drum, make intimation to the haill 'inhabitants, requiring all habile burgesses within the burgh to 'repair to the tolbooth upon the prefixed day, and there give 'their respective votes in the election of bailies and treasurer 'for the ensuing year; it being the custom of the said town, 'ever since its erection into a Royal Burgh, to elect their bai-'lies by a vote of the haill burgesses that will qualify in terms 'of law. In obedience to which intimation the haill burgesses 'convene accordingly, about nine o'clock in the morning; but, 'before election, the old bailies and council convene in the 'council-house, and take in the treasurer his accounts of intro-'missions, with the town's patrimony that year; which being 'done, and him discharged, they immediately nominate a new 'council for the ensuing year, and thereafter ordain all the 'burgesses that are to vote to qualify according to law; which 'being also done, they proceed to elect; and first the bailies 'give in a leet of nine persons, whereof they themselves are 'always three, out of which they are to choose the three bailies 'for the year ensuing; and the treasurer gives in his leet of 'three persons, whereof he himself is always one, out of which 'they are to elect their treasurer for the said year; which being 'read over in presence of the council, and approven of by them, 'is read publicly in audience to the haill burgesses that are to 'vote; this being done, the clerk is appointed to sit within the 'council-house and mark the votes, there being always one of 'the council appointed to oversee his right marking; and ac-'cordingly, first the bailies, then the treasurer, council, and 'thereafter the haill qualified burgesses, one by one, give their 'several votes for the bailies and treasurer for the said ensuing 'year, and the persons chosen by plurality of votes, together 'with the new council, immediately convene within the coun-'cil-house and accept of their respective offices, and give their 'oaths de fideli administratione, the same being tendered to the 'three bailies by the clerk, and by them first to the treasurer 'and then to the council; which being done, they adjourn.

'This form and manner of election hath always been prac-'tised and made use of within the said town of Kilrenny ever 'since the erection thereof into a Royal Burgh, as will appear 'by the records of council thereof.'

At Michaelmas 1823, an election took place of Magistrates of the Burgh, against which Gardner and others, who were burgesses, presented a petition and complaint to the Court of Session, alleging, that for a long period of time, three separate and distinct leets had been made—the first containing three names, out of which the first bailie, or chief magistrate, was chosen;

the second, also containing three names, out of which the second bailie was elected; and the third, likewise containing three names, from which a choice was made of the third bailie; and they rested their complaint on these grounds:— March 23, 1827.

'1st. The magistrates and council, instead of sending down 'to the burgesses three separate leets of three persons each, 'from which the burgesses might choose at once who should be 'first, second, and third bailies respectively, sent down only one 'leet of nine persons, from which the burgesses were merely 'permitted, as it were, to return a shortened leet, or, in other 'words, to make a general choice of three persons, without a 'special reference to the individual office to be held by any of 'the three. The leet thus sent down was as follows: "James 'Reekie, Andrew Crawford, John Morris, John Davidson, John 'Marten, John Reid, James Lothean, John Lyall, and John 'Reekie." The three persons returned were Andrew Crawford, 'John Morris, and James Reekie. But it is submitted, that as 'these three persons were chosen from an illegal leet, as they 'were not named individually to the respective offices which 'they were to fill in the magistracy, and generally, as they were 'returned contrary to the terms of the set as fixed by immemorial usage, their appointment or election was illegal or null 'and void.

'2d. The magistrates and council having thus obtained a general return of three individuals, usurped to themselves the 'power of nominating therefrom as they pleased the individuals 'so chosen, to their respective offices of first, second, and third 'bailies. Now, even if it could be supposed to be legal to make 'the burgesses to elect from one leet of nine, in place of three 'leets of three persons each, still it is submitted that the nomination of the individuals elected as first, second, or third bailies respectively, ought to have been regulated according to 'the plurality of votes as given by the burgesses, and that the 'magistrates and council ought to have had no control over 'this matter. But although by the poll of the burgesses, 'which has also been recovered by virtue of your Lordships' 'order already referred to, Andrew Crawford and John Morris 'appear to have had fifty-seven votes, while James Reekie had 'no more than thirty; yet the magistrates and council, contrary 'to the rights of the burgesses, and to the immemorial usage 'and set of the burgh, appointed James Reekie (who had fewest 'votes) to the office of first bailie, and Andrew Crawford and 'John Morris (who had most votes) to the office of second and 'third bailie respectively.'

March 23, 1827. They therefore prayed the Court 'to find the election of Magistrates and Council, which had been made at Michaelmas 1823, to have been illegal, contrary to the set, laws, and constitution of the said burgh, and the laws of the land, and absolutely null and void, and to reduce and set aside the same accordingly,' &c.

In answer to this complaint, Reekie and others, who had been elected Magistrates and Councillors, stated that there was no such usage as that which was alleged; that the set was the governing rule of election; that, with a few exceptions, a leet of nine names had been invariably presented to the burgesses, without reference to the offices of first, second, and third bailies; and that even if the election had taken place in the mode contended for by the burgesses, the result would have been exactly the same.

The Court, on the 8th of July, 1824, dismissed the complaint, and found Gardner and others liable in expenses. Against this interlocutor they presented a petition; on advising which, with answers, their Lordships ordained them to give in a condescendence of their averments, and thereafter, on resuming consideration of the case, their Lordships, before answer, 'remitted to 'Mr Archibald Swinton, writer to the signet, to examine the 'whole record books of the burgh of Kilrenny, and also the poll 'books for the period subsequent to the Union, down to the present time, so far as the same are in existence, and to report to 'the Court, on or before the third sederunt day in November 'next, everything occurring to him to be material to the issue, 'and appearing from the said books, in relation to the practice 'of the burgh, regarding the mode of framing and giving out 'the leets, and also respecting the mode of conducting the elections in said burgh.'

Mr Swinton accordingly made up an investigation, and after detailing the facts, he reported, 'that in so far as I can judge 'from the evidence afforded by the sederunt books and poll 'books of the burgh, it appears to me, that according to the 'original set of the burgh, and the usage which followed upon 'it for the first twelve years after the Union, the practice was, 'in choosing the bailies, to make up one general leet of nine 'persons, and for the burgesses to vote upon that leet, without 'any references to the offices of first, second, and third bailies; 'but that it afterwards came to be the usage to subdivide the 'general leet into one of three trios, each trio containing a bailie's name and two nominees; and that, in giving their votes, 'the burgesses voted for one or other of the three persons named

'in each leet, but never for more than one; so that the three March 23, 1827.
'persons reported by the clerk to have the plurality of votes,
'must necessarily have been taken each out of a separate trio;
'whereas, according to the mode followed at the election com-
'plained of, the votes of the burgesses were taken on one gene-
'ral leet, without reference to the places of first, second, or third
'bailie. In the one way, there is no doubt that the burgesses
'have it in their power, much more than in the other, to bring
'in whom they please to be chief magistrate, because they have
'an opportunity of knowing who are the three persons in that
'bailie's leet, and for voting accordingly for one or other of
'them; and thus they have, in so far, a privilege which may be
'considered of some importance to them, as the first bailie in
'this burgh exercises the same powers with the Provost or Lord
'Provost of those burghs where their chief magistrate is honour-
'ed with those titles. It is, however, undeniable, that the three
'persons chosen at the election complained of, had the plurality
'of votes; and it is equally undeniable that they would have
'been the bailies returned, in whatever form the leet had been
'made up, so the complainers cannot allege that they were in
'any respect disappointed in their choice; and the only irregu-
'larity committed was, that the votes were taken on a leet or
'roll made out in a different form from what I have no doubt
'had been the accustomed practice from 1719 downwards. It
'therefore only remains for your Lordships to decide the point
'of law, whether the deviation or irregularity above described
'be sufficient to set aside in toto the election complained of;
'seeing the mode of procedure then followed was precisely in
'conformity with the original set of the burgh, was the mode
'practised for twelve years after the Union, and except in so far
'as establishing a precedent, which, if allowed to be persisted
'in, might on some future occasion be prejudicial to the rights
'of the burgesses, cannot be said in any respect to have injured
'or disappointed the burgesses in the choice of the three bai-
'lies.'

On advising this report, the Court, on the 9th March 1826, refused the petition, and adhered to the interlocutor reclaimed against.*

Gardner and others then appealed.

Appellants. 1. As it is established that not only the set or constitution of a burgh may be constituted by usage alone, but that

* See 4 Shaw and Dunlop, No. 362.

March 23, 1827. even a written set, whether constituted by the charter of erection, or by an act of the Convention of Burghs, may be controlled, modified, and altered, by a subsequent contrary usage; and as in this case the elections had from 1719 till 1819 been uniformly made in the manner alleged by them, the election which had taken place in 1823 was contrary to law. And,

2. It is not relevant to allege that the same result would have been arrived at by the illegal mode of election complained of, which would have been attained if the election had taken place according to the legal mode contended for. But in point of fact this was not the case; and even a deviation from the written set had been made.

Respondents. 1. Although it is true that a set may be modified by usage, yet, in this case, it was established that there was no such usage as that which was alleged; and,

2. As the very same persons would have been appointed had the leet been issued in the form wished for by the appellants, they had no interest to complain.

The House of Lords 'ordered and adjudged that the cause 'be remitted back to the Court of Session in Scotland, to in-'quire whether any and what usage, differing from the set of 'the burgh, has taken place, as to the form or number of the 'leets, and mode of election of the three bailies of the said 'burgh, and for what length of time such usage has prevailed; 'and whether, having regard to the nature of such usage, if any 'shall be found, upon such inquiry, to have taken place, and 'the length of time during which it shall be found to have pre-'vailed, such usage ought, according to law, to be considered 'as modifying or altering the set of the said burgh, as to the 'form or number of the leets, and the election of bailies; and, 'after such consideration and inquiry, to proceed farther upon 'this petition and complaint as is just.'

March 10, 1827.

LORD CHANCELLOR.—My Lords, there are two cases which I wish to mention now, as cases in which I propose to move the House to give judgment on the second day of next week in which cases are heard. I mean the cases with respect to elections in Scotland. There is one of them which depends very much upon the question, whether there has been any such usage for any given period of time as has altered the set of the burgh with respect to the mode of carrying on election. If it depended upon this, that the same persons appeared to be elected in the form in which the election was made, as might have been elected in that form which, if there had been an usage, would have been the prescribed

form, it does not appear to me that the consideration, that the same per- March 23, 1827.
sons had been elected, would by any means support the election; because I take the form of the election to be of the essence of the election; and, more particularly, if there are special officers who are to name individuals, out of which individuals a choice is to be made by the general electors. I take it to be a principle of our constitution, and I think the Scotch Courts follow that, that there is first to be the judgment of particular individuals recommending other individuals, and then to be a choice by the electors in general out of those individuals who are so recommended; and I cannot conceive, at least according to any English doctrine, that if nine individuals are proposed, out of whom the whole body of electors are to choose, that the mere circumstance that they happen to choose three who might be the same individuals, if, instead of there being one list of nine, there had been three lists of three, out of each of which lists the general body of electors were bound to choose one. I do not apprehend that the circumstance of the election falling upon the same individuals, if it could be demonstrated that it would have fallen upon the same individuals in either case, would do to support an English election, because, if the constitution of a burgh election is, that those individuals who are to name those respective lists of three have a duty to give a protection to the proceeding, which was to place in the situation of magistrates the individuals who were to be chosen, the mere accident, if there is one list of nine, instead of three lists of three, of the individuals being recommended in the three lists of three, by those who had a duty, according to the constitution imposed upon them, of pointing out, in the first instance, who are the individuals that they think ought to be trusted, and those out of whom the choice should be made, is not sufficient; I think the departure from that form would be considered, in our Courts, as of the essence of the proceeding, and that if that were challenged, it would not do.

It remains, however, to be examined most carefully and most industriously, whether there be any such usage or not as that which is said to have varied the set of the burgh, because, if the usage does not exist, if there has not been a consistent usage for a certain number of years, (I think the law of Scotland requires forty), if a usage has not existed which varied the set of the burgh, no question arises; and I entertain very considerable doubt upon this, whether it has or has not been too hastily taken for granted, that no further proof should be entered into before the decision was made in the Court of Scotland. Having just broken this subject, I will proceed, upon the second day of causes in the next week, to propose to your Lordships the judgment in that case.

My Lords, with respect to the other case, * if it were a question arising upon the law of England, there would be no doubt about it; for I do not apprehend that a statute which gave a summary complaint, is a statute which would take away the common law remedy. But one is extremely distressed in this case, because the case of Young *v.* Johnston, in the House of Lords, at a date pretty nearly contemporaneous with the

* Tod *v.* Tod, p. 542.

March 23, 1827. statute, appears, according to Mr Wight's note of it, to have decided (as it has been alleged from the Bar) that the action of reduction must be brought within two months. Now I cannot satisfy my mind on what ground it should be held that the action of reduction should be brought within two months, unless the statute related to actions of reduction as well as summary complaints, and considering the nature of the evidence, as we find it in the printed cases in the House of Lords, and that there is not a single word that would support the judgment in that evidence, still although that point does not appear to have been mentioned in the printed cases, there appears to be something hanging about that case, which makes it look very much like an authority in the House of Lords upon the point. Whether that case which has been so represented as of authority, has been well decided, or not well decided, is a matter which, I apprehend, this House could not trust itself to examine.

March 19, 1827.

LORD CHANCELLOR.—There is a case of Gardner *v.* Reekie, in which the question is, whether nine persons should be named from among the burgesses at large, out of which there were three to be chosen, or whether there should be three lists of three persons, from each of which three *lists* one individual should be named; I will take that case another day. But, after again thinking on that subject, I am satisfied upon two points: first, with respect to an usage which is not exactly conformable to the set of the burgh, but which is a mode of modifying the proceedings in carrying into effect what the set of the Burgh requires, it is necessary to inquire whether there is a clear usage of forty years of delivering three lists of three each, and if that fact could be established, that there was a clear distinct usage of forty years, then the circumstance, that in this case it happened that the same individuals probably would have been chosen, if there had been three lists of three, as were chosen out of the one list of nine, does not make it a clearly established and good election; for it is extremely clear, that if the three old bailies were, according to the usages of the elections, each of them to name a list of three, comprehending in each list themselves and two other persons, and that, out of the first of these lists, an individual should be chosen, which individual should be one of the magistrates in the next year; and that out of the second list another individual should be chosen, who should be another magistrate in the next year; and that out of the third list, another individual should be chosen, who should be another magistrate in the next year, the constitution of the burgh, as looked at, would authorize us, or, indeed, require us, to say that there was a duty devolving upon these old magistrates to take care to name distinct individuals, who should be the objects of choice by the burgesses at large, and their not having exercised that duty, will not permit of this answer being given, that the same individuals were chosen as if they had exercised that duty; because, in this mode, the election could not have that sanction which, under that rule, it was intended to have. I come, therefore, to this conclusion, that it is advisable, before your Lordships proceed to judgment in this case, to see whether there was before the Court of Session clear proof that such an usage was established.

March 23, 1827. March 23, 1827.

LORD CHANCELLOR.—My Lords, in the cause of Gardner v. Reekie, it became necessary, upon reference to the circumstances of the case, to see the agents on both sides, which I have taken an opportunity of doing.

The question in this case arises upon the election of the Magistrates and Town Council of the Burgh of Kilrenny in the year 1823. In the set of the burgh the form of election is stated; first of all the bailies, of whom there are three, give in their leet of nine persons, whereof they themselves are always three, out of which they are to choose the three bailies for the year ensuing, and the treasurer gives in a leet of three persons, whereof he himself is always one, out of which they are to elect the treasurer for the said year, which being read over in the presence of the council, and approved of by them, is read publicly in audience of the haill burgesses who are to vote. This being done, the clerk is appointed to sit in the Council-house and mark the votes, there being always one of the council appointed to see his right marking; and, accordingly, first the bailies, then the treasurer, council, and thereafter the haill qualified burgesses, one by one, give their several votes for the bailies and treasurer for the said ensuing year. And the persons chosen by plurality of votes, together with the new council, immediately convene within the Council-house and accept of their respective offices, and give their oaths de fideli administratione, the same being tendered to the three bailies by the clerk, and by them, first to the treasurer, and then to the council—which being done, they adjourn.

My Lords, in this case, a complaint was made against the election on two grounds; first, that the leet of nine given in by the bailies was not subdivided into three leets. Your Lordships will observe, that according to the original set of the burgh which I have read, the bailies are stated to give in one leet of nine persons, out of which three bailies are to be chosen for the year ensuing; but the complainants insist, that instead of a leet of nine being given in, there should be a subdivision into three leets, 'the first containing the name of the first magistrate of the former year, 'and two other names, from which alone the new first magistrate should 'be elected; the second, containing the name of the second magistrate 'of the former year, and two other names, from which alone the new se-'cond magistrate should be elected; the third, containing the name of 'the third magistrate of the former year, and two other names, from 'which alone the new third magistrate should be elected.' They alleged that there had been usage to that effect. This allegation, that there had been a usage to that effect, as to the importance of it, depends upon this, whether, admitting, that the set of the burgh in 1710 was of a certain nature, there has been an usage—an uniform usage—such an usage as would amount to a regulation of the mode of election, from and after the time that that usage took effect, by continuance, which would, in the respect I have mentioned, admit of being considered as having become a valid modification of the set of the burgh, or a valid alteration of the set of the burgh.

There was another ground taken, which I do not think it necessary to

March 23, 1827. trouble your Lordships upon, namely, that the oath against bribery and corruption had not been properly administered. I do not think that has been successfully contended, nor do I think it can be successfully contended at the Bar, that the case proves anything like what would be enough, if anything could be enough, to set aside the election, and therefore I need not trouble your Lordships any farther upon that part of the case.

My Lords, all that we have heard from the Bar, with respect to the opinion of the learned Judges who decided this matter in Scotland, before whom it was brought by petition, is, that they were of opinion, that as there had been an election which produced the same result by one leet of nine persons as would have been the result if there had been three leets of three given in, according to this modified set of the burgh, it was not subject to objection. Now, my Lords, attending to what is necessary to be done in this case, I cannot think it would be right to go, as stated in this judgment, upon a representation of that kind. If I were, I should certainly feel strongly disposed to say and think I am right in that, unless my mind is influenced by English principles, more than it ought to be, with respect to a Scotch case, that, according to my notion of the matter, the identity of the result, if the form of election has not been right, would not make the form of the election, or the election good, because I take the form of the election in these corporate bodies to be of the substance and essence of what they are to do; and indeed I think it would be very easy to demonstrate, that if the result upon which the choice is made of three persons out of one leet might be exactly the same as the result when the choice is made of three persons out of three leets; upon reasoning, as applied to corporate acts, it might be clearly shown that that might be very often not the case where the proceeding was in truth upon one leet of nine, instead of being a proceeding by three leets of three in the one case, three individuals recommending each a separate leet, and in the other case, three individuals recommending one leet, and not three separate leets. I think it might be so clearly shown, that in many cases the result would not be the same, that at least, according to our laws of election, and the way in which we should treat the subject here, it would be impossible to say that the identity of the result would render such an election good.

But, my Lords, in order to see whether you can get at that question, you must look at another question, and you must look at the effect of the evidence in the cause; and with respect to that other question, and the effect of the evidence in the cause, I cannot collect either from what is in these papers, or from what has been stated at the Bar, that we have had the opinion of the Court of Session upon the point I am now alluding to. If I must give an opinion, I should say, without having been better assisted upon that point, that if there was clear uniform usage for forty years together, which forms a kind of prescription in the law of Scotland, according to which uniform usage, they have proceeded by three leets, composed by three bailies, instead of proceeding in the old mode of one leet, according to the set of the burgh in 1710, that that uniform usage made

out distinctly in point of evidence, and shown by evidence to have existed, might, according to the law of Scotland, either be considered as such a modification of the set of the burgh, or such an alteration of the set of the burgh, as that it ought to be proceeded upon as the true construction of the set of 1710, or such an alteration as might be available according to the law of Scotland; but, notwithstanding I have said thus much on the result, it is not my intention to prejudice either of the questions of law, upon which I have taken the liberty to say a word or two. March 23, 1827.

My Lords, if I understand the course which the case took in the Court of Session in Scotland, it does not appear to me that the Court went so far as to inquire whether there had been such an usage, or to give any judicial opinion upon the question of what would, or what would not be, according to the law of Scotland, the effect of such an usage, the Court of Session being of opinion that, the result being the same, therefore it was unnecessary to inquire any farther. I am afraid, that, according to our laws we cannot go on in such a state of the cause, and that it is necessary to do that, which, for various reasons, I have a great objection to doing, I mean to remit this cause back again to the Court of Session, with a direction that they should inquire, whether there is in this case sufficient proof, or whether, according to their practice, sufficient proof can be given upon a farther inquiry, by referring it to a jury, or in whatever other way, that for the period I have mentioned there has been a clear uniform usage to substitute three leets instead of one leet; and that they should inquire, what, according to the Scotch law, is the effect of that usage, either in modifying or in altering the set of the burgh. If the proof that is given is not sufficient to make out that there has been such a consistent and uniform usage, for such a given period (if any given period be sufficient) as would amount to a valid modification of the set of the burgh, or an alteration of the set of the burgh; then, to be sure, if the question is to be decided upon the want of evidence of that usage, that would make it unnecessary to determine the point of law that would arise, if there were distinct evidence of such an uniform usage. On the other hand, we are not informed here whether if it should turn upon the question of insufficient evidence, it would be the bounden duty of the Court, according to their practice, to inquire farther into the fact of the usage, or the means which they would adopt, in order to give themselves the benefit of such further inquiry.

Upon these grounds, therefore, after looking at this case repeatedly, and looking at it with that want of inclination ever to remit to the Court of Session in Scotland, which I have been taught by many lectures addressed to me upon the subject to entertain, it does appear to me, that notwithstanding all, it is quite impossible in this case to do otherwise than to make such a remit. The form of that remit must be drawn out, and it seems to me it is the only way in which we can dispose of this case.

Appellants' Authorities.—Wight, 333. 4.—Gillon, Sup. 134. 6.—Bell, 481.—1 Erak. 1. 45.—Edin. Election Case, 27 Jan. 1821. (6.)

RICHARDSON and CONNEL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

No. 40. JOHN TOD and Others, Appellants and Respondents.—*Solicitor-General Tindal—Robertson.*

JAMES TOD and Others, Respondents and Appellants.—*Spankie—Keay.*

Burgh Royal.—Stat. 16 *Geo. II. c.* 11.—*Expenses.*—Held,—1, (affirming the judgment of the Court of Session,) that it is not competent to raise an action of reduction of an election of Magistrates of a Royal Burgh, made in virtue of a royal warrant, after the expiration of two months from the date of election—2d, (reversing the judgment,) that as the above statute ordains costs to be given to the successful party, the defenders resisting the reduction ought to have got expenses,—and, 3, That an appeal in regard to these expenses was competent.

March 26, 1827. 1ST DIVISION. AT the election of Magistrates for Pittenweem, at Michaelmas 1822, John Tod was elected first bailie, or chief magistrate; James Tod second bailie; and two other individuals third and fourth bailies. These persons, along with a treasurer, and nineteen councillors, being twenty-four in all, formed the full council. On this occasion, Sir William Rae, his Majesty's advocate, was elected a councillor, but it was alleged he had never qualified himself by taking the oaths. In the course of the year a schism arose in the council. John Tod, and eleven others, formed the one party; while James Tod, and eleven others, constituted the other party. On the day of the annual election at Michaelmas 1823, one councillor from each of the parties was abroad, so that they were equal in numbers. James Tod and his party declined to attend, and thereupon John Tod and his friends (being altogether eleven persons,) proceeded to elect certain of their own party to be magistrates. By the constitution of the burgh, it was necessary there should have been a majority of the councillors present, and therefore as there had only been eleven, whereas the council consisted of twenty-four, a complaint was presented to the Court of Session by James Tod and his friends, on this ground, and the election was in consequence set aside. The burgh being thus disfranchised, a petition was presented by each of the parties to the Court, praying for the appointment of interim managers. In that presented by James Tod, he prayed that he himself, certain of his friends, and four of the opposite party, including John Tod, should be appointed, and this prayer was granted.

A petition was then addressed by James Tod and the other managers, to the King in Council, for restoration of the privileges of the burgh; and a similar petition was presented by John Tod and his party. After the usual forms had been gone through,

a royal order, or warrant, was issued on the 19th July, 1825, March 26, 1827. in these terms:—

'His Majesty having taken the said report into his consider-
'ation, was pleased, by and with the advice of his Privy Coun-
'cil, to approve thereof, and to order, as it is hereby ordered,
'that for restoring the peace and good government of the said
'burgh, the persons who composed the magistrates and town-
'council of the said burgh, on the day preceding the 16th of
'September, 1823, or the majority of such of them as shall at-
'tend, do meet and assemble within the town-house of the said
'burgh of Pittenweem, upon the 13th day of September next,
'at 12 o'clock at noon; and when so assembled, do proceed to
'choose and elect the usual number of persons to be councillors
'of the said burgh; which councillors, so chosen, shall be em-
'powered forthwith to proceed to the choice of magistrates
'and office-bearers, according to the set of the burgh; and
'which councillors, magistrates, and office-bearers, shall con-
'tinue in office until the ordinary time of the annual change of
'the councillors, magistrates, and office-bearers of the said
'burgh, in the year 1826; and then, and from thenceforth, the
'procedure in the election of councillors, magistrates, and of-
'fice-bearers, shall be made according to the provisions of the
'constitution, or set, of the said burgh, whereof all persons
'concerned are to take notice, and pay due obedience hereto.'

This warrant was not addressed to any particular person, but it was delivered to the solicitor for James Tod and the other managers, by whom it was transmitted to them. On consulting counsel, they were informed, that it was their duty, by a precept, or order issued by them, to give notice of the warrant to the persons therein named, to proceed to the election at the appointed time. A precept was accordingly issued, under the signature of James Tod, as chief manager, and the seal of the burgh, requiring those who had been magistrates and councillors, prior to the 16th of September 1823, to attend in terms of the warrant. One of the councillors was dead; and it being alleged that the Lord Advocate was not qualified to act as a councillor, it was resolved that he should not be summoned, but that intimation should be made to him by a notary public and witnesses, in order that, if he conceived he had any right to vote, he might take the requisite steps for having it established. On the 13th of September, being the day of election, James Tod and his party being in possession of the keys of the Council Chamber, got access to it, and thereupon, having seated themselves round the Council-table,

March 26, 1827. James Tod took possession of the chair. When John Tod and his friends, accompanied by the Lord Advocate, got admission, they found their opponents in this situation, and they therefore sent for another table, round which they seated themselves on benches, and John Tod placed himself in a chair at the head of it. The Lord Advocate then protested that he had *right to* vote, which was resisted by James Tod and his party. *On the* assumption that he had such a right, the two parties were equal in number, and a violent dispute therefore took place, both upon this subject, and as to the person who was entitled to be preses, and who, as such, had a casting vote. A vote was then taken, when, in consequence of the rejection of the vote of the Lord Advocate, James Tod was elected preses by his friends. On the other hand, John Tod and his party contended, that the Lord Advocate had right to vote, and that as John Tod had formerly been chief magistrate, he had the casting vote, which he gave in favour of himself, and therefore they insisted that he had been duly elected preses. A list of councillors was then presented by each of these parties, and of course each voted for those contained in their own list. As James Tod and his friends were in possession of the Council-books, they recorded their list in them, and they then declared their nominees duly elected. A motion was thereupon made, that John Tod and his party should forthwith withdraw, as they were no longer members of the council; while they, on the other hand, attempted to introduce a notary public and a clerk, to record their own minutes. This gave rise to another altercation, in consequence of which the Sheriff-substitute (who was in attendance) was obliged to interfere.

Within two months thereafter, John Tod and his friends brought a summons of reduction of the election, but this process was dismissed, in consequence of a defect in the execution. A new summons of reduction was then raised, on the 21st of December 1825, against which various objections were stated, and particularly it was pleaded, under the fifth head of the defences—'The present action is clearly incompetent on two 'grounds: 1st, An annual or general election of magistrates 'and councillors for the year cannot be challenged in any other 'mode than by a petition and complaint to the Court of Ses- 'sion, presented within two kalendar months of the date of the 'election complained of; and 2d, Supposing the challenge 'could be made by an action of reduction and declarator, that 'action must be raised, executed, and brought into Court, with- 'in the two kalendar months following the election.'

To this it was answered, That the election, having been made March 26, 1827. in virtue of a royal warrant, did not fall within the statute; that the pretended election was made in opposition to the terms of it; and that, at all events, as a reduction was a remedy at common law, the institution of it could not be limited to two months.

The Court, on advising the summons and defences, with Cases on the 2d of June 1826, 'Sustained the fifth preliminary objec-'tion, or defence, stated upon the part of the defenders, against 'the competency of the present action; dismissed the same as 'incompetent; and assoilzied the defenders from the whole con-'clusions of the libel, and decerned, but found no expenses 'due.'

Both parties appealed,—John Tod and others against the interlocutor dismissing the action,—and James Tod and others on the point of expenses.*

Appellants. (JOHN TOD AND OTHERS.)—I. The provisions of the statute 16 Geo. II. c. 11, upon which the defence is founded, are totally inapplicable to the circumstances of the present case, and the nature of the present action; because,

1*st.* This is not a complaint against the proceedings of an annual election of magistrates, or of any meeting preparatory thereto;—whereas the statute founded on by the respondents merely introduces a summary mode of redressing wrongs done at annual elections and meetings preparatory thereto.

2*d.* The statute founded on by the respondents relates exclusively to the case of the minority of a meeting complaining of the acts of the majority;—whereas the appellants were not, physically or legally, the minority of the meeting; and the proceedings of which they complain were not done by either the physical or legal majority. In this discussion it must be assumed, that the allegations of the appellants, as to Sir William Rae's right to vote, are correct; and the question is, whether the action is competently brought, upon the assumption of the facts on which it is founded.

3*d.* The action relates, not to an act done against the set of the burgh, or the ordinary rules or laws of election, but to acts of dis-

* It may be proper to mention, that as in this case judgment had been pronounced on the summons and defences, in regard to a preliminary defence, without closing a Record, each of the parties presented an Appeal Case, consisting of the summons and defences, with their respective Cases, in the Court of Session, and a short supplementary statement, reciting the interlocutor which had been pronounced, and containing the reasons of appeal.

March 26, 1827. obedience of the royal warrant, whereby the appellants were obstructed in the execution of that warrant, and are now interrupted in the exercise of their legal functions by persons who have illegally obtruded themselves into the management of the burgh, and against whom they applied for summary redress by suspension and interdict. These acts of disobedience of the royal warrant, and attempts to frustrate the execution of it, were not even limited to the meeting appointed by the warrant to be holden, but commenced at a prior period, and were parts of a continued and regularly digested plan to defeat the royal warrant.

II.—Even supposing this to be one of the cases to which the remedy introduced by the statute 16 Geo. II. c. 11, might have been applied, still that remedy is not exclusive of all others. The common law remedy, by ordinary action, still remains; and the limitation, in point of time, introduced by the statute, is applicable only to the summary remedy by petition and complaint, thereby introduced. And,

III.—An appeal on a question of expenses is not competent.

Respondents. (JAMES TOD AND OTHERS.)—1. The election, although made in virtue of a royal warrant, was a proper annual election of Magistrates; and as such, fell within the provisions of the statute. But it has been decided, that by that statute, a code of laws regulating complaints against elections was established, excluding altogether the remedies at common law: And, therefore, the appellants ought to have proceeded by a summary petition and complaint, and not by a reduction; and, at all events, they could not competently get the election set aside by proceedings adopted two months from the date of election.

2. In regard to the question of expenses, it may be true that it is not competent to appeal in the ordinary case; but the Court of Session have disregarded the express injunction of the statute, which declares that the successful party shall be found entitled to his expenses; and, in such a case, it is quite competent to appeal, and the Court were not entitled to refuse giving effect to the statute.

'The House of Lords ordered and adjudged that the said interlocutor complained of in the said original appeal be, and the same is hereby affirmed, except in so far as it omits to give costs; and it is declared that the respondents ought to have had the costs of proceeding in the Court of Session, according to the true intent and meaning of the statutes, relative to pro-

'ceedings in such cases; and it is further ordered, that the cause March 26, 1827.
'be remitted back to the Court of Session in Scotland, to do
'therein as shall be just and consistent with this declaration.
'And it is further ordered and adjudged, that the said interlo-
'cutor, so far as complained of in the said cross appeal, be,
'and the same is hereby reversed.'

LORD CHANCELLOR—My Lords, there is a cause which your Lordships have been pleased to order to stand for judgment to-day, in which John Tod, flesher of Pittenweem, and others, are appellants, and James Tod, and a great number of others, are the respondents. This is an action of reduction and declarator, for setting aside the proceedings at an election, which were had in consequence of his Majesty having been pleased to restore the burgh of Pittenweem. It has been very much discussed in the papers, as well as at your Lordships' bar, whether this was to be considered as within the meaning of the words of the act of Parliament an Annual Election—whether it was to be considered as a proceeding to be distinguished by majority or minority. Strictly speaking, on looking at the numbers, John Tod and ten other persons made eleven, and James Tod and ten others made eleven also, so that you can hardly call it a majority and minority.

But the question is, whether, regard being had to the nature of the proceedings, this is not within the true intent and meaning of the act of Parliament to which reference has been made; and, on the best consideration I can give to the subject, I think that, though this was an election held in consequence of his Majesty restoring the burgh, and although there was most unseemly diversity of opinion, and very singular conduct in the proceedings when the election was had, yet that still it is to be considered as an annual election, and a complaint within the intent and meaning of the statute.

Then the question is reduced to this, namely, whether, in this species of action, which is an action of reduction and declarator, it is competent to bring that action after eight weeks or two months had expired after the election, and before the institution of that proceeding. On the one hand it has been contended, that this is not to be considered as a proceeding under the statutes which regulate the election of councillors, and other persons at these burgh meetings, but that it is to be considered as an action brought according to the common law of Scotland; and that being an action brought according to the common law of Scotland, there is no statute which ought to be considered as a bar; and I have no hesitation in stating to your Lordships, that if we were here to judge of the law of Scotland upon English principles, (which we ought never to do, and which I believe we have never intentionally done,) it might be a difficult thing to say that where, without words excluding the common law, a special proceeding is provided by act of Parliament, the general operation of the common law would be considered as taken away; and yet I cannot go the length of saying, that if there are statutes, in pari materia, you may

March 26, 1827. not infer such a shutting out of the remedy under the common law, without any expression in the act of Parliament which your Lordships have to construe.

But, my Lords, I find in this case a difficulty that I apprehend is quite insuperable, because my humble opinion is, that this point has been already determined by your Lordships, and that we cannot now alter it, whatever might have been our opinion upon the question, whether this common law jurisdiction was shut out or not by the special provisions.

My Lords, the case of Johnston *v.* Young has been alluded to, together with the authority of Mr Wight and Mr Bell. With respect to the first named of those gentlemen, I think I am old enough to have had the honour of practising along with him at your Lordships' bar; and that he was a very great authority on these subjects, nobody can deny; nor did I ever hear any dispute with respect to the correctness of his representation as to matters of law in which he had been concerned. I need not state to your Lordships who Mr Bell is, because you are all aware that he is a person whose authority is of considerable weight, though still he is a gentleman practising at the Bar. *

Upon looking at the case of Johnston *v.* Young, I have not been able to find that there is one word in the printed cases on the subject; and yet it would be extremely difficult, upon looking at the evidence in that case, to conceive how this House could have made the decision which it has, unless the decision that it made went upon a ground that formed no part of the allegations in the printed cases or the evidence; and, accordingly, Mr Wight has recorded in his work, that the reversal in this case went upon a ground neither mentioned in the Court of Session in Scotland, nor mentioned in the printed cases laid upon your Lordships' table; that it went upon this ground, that the action of reduction was competent, but still that it must be brought within two months.

It has been supposed that there is some mistake upon that subject; but when we come to look at a subsequent case that is to be found, which has been decided by your Lordships, it appears to me, that it is quite impossible to contend, with any hope of persuading the House, that Mr Wight is mistaken as to that fact. In a subsequent case, which was heard at your Lordships' bar in the year 1785, in which Robb and others were appellants, and Thomson and others, magistrates and councillors of the burgh of Anstruther Wester, were the respondents, in the printed case in that proceeding this is stated:—'Supposing it were 'competent to the appellants, though not constituent members of the 'council of Anstruther Wester, to insist in the present action, yet, as 'the act of 7th and 16th of his late Majesty have expressly limited the 'time for preferring action or complaints to two months after the elec-'tion complained of, and the present action was not brought till near 'twelve months after the election complained of, it is therefore incompe-

* His Lordship, it is presumed, must have supposed that the Treatise on Election Law was written by Mr Professor Bell, whereas it was written by his brother, Mr Robert Bell, who died several years ago.

'tent, and could only have been brought with an intent to create trouble March 26, 1827.
'and confusion at the Michaelmas election, which was to come on a few
'days after the summons was raised, the prevention of which was the
'principal object of the statutes.'

Then this reason, which has the signature of Mr Wight, goes on to say, (and it may be considered therefore that this representation was made to this House with respect to what it had done in the case of Johnston *v.* Young,) 'this point has been already determined by your Lordships, who 'reversed a judgment of the Court of Session upon this single ground; 'and that, in a case where a complaint of the same election had been 'brought within two months, but had been dismissed on account of a 'mistake in the name of one of the defendants, after which an action of 'reduction, similar in form to the present, was brought by several consti-'tuent members of the council. No objection was taken to the action in 'the Court below, nor even in the cases upon the appeal. The Court of Ses-'sion reduced the election; but, upon this objection being taken at your 'Lordships' bar, your Lordships reversed the decision of the Court below, 'without even going into the merits of the case, upon the single ground 'that the intention and purpose of the acts above quoted was to form a 'code for the election of magistrates and councillors in Scotland; and, 'while it gave remedies in cases where there was formerly no remedy, it 'also cured evils which arose from the old laws; and among the other 'evils the act intended to remedy, there was no greater than that it was 'in the power of persons, by bringing actions of declarator and reduction, 'to reduce elections made many years before, and long after the persons, 'whose elections were complained of, were out of office. This question 'was very fully entered into by your Lordships, and has ever since been 'understood to be finally settled; and in that case also the appeal was 'dismissed.'

My Lords, when we are looking at these statutes, which are all made in pari materia, it would be a very singular thing to say, that though the magistrates and councillors are in the form of action required under these statutes, to proceed within eight weeks, yet that there is another form of action at common law, in which they need not proceed for eight years, or any given time. I look upon it, therefore, that these cases of Johnston *v.* Young, and Robb *v.* Thomson, decide this point; and I dare not venture to give your Lordships any advice which shall militate against the decision of this House, pronounced in the case of Johnston *v.* Young, and thus represented to the House in Robb *v.* Thomson, in the year 1785, in which case also the result was the same.

My Lords, there is a cross appeal, which I feel some difficulty how to deal with. That is about the costs. That those costs should have been given, is pretty clear. This House never does entertain an appeal for costs where costs are in the discretion of the Court below; but when the legislature, by a statute, has expressly required that the Court of Session, in the case of an action that is brought under the authority of that statute, and in the case of a summary complaint which is brought under that sta-

March 26, 1827. tute, the Court shall make the party who fails pay the full costs of suit, it does appear to me that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute. If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie; but, on the other hand, if this is a case within the intent and meaning of the statutes to which I have referred, it appears to me that the costs ought to be given. The great difficulty I have had to decide is, in what form we are to do this—how we are to give that judgment. The two gentlemen who stand at the bar, who are the agents in this matter, will probably give me the benefit of their knowledge of the practice of the Court of Session; and, desirous that we may be quite right, I would propose that we should have the opportunity of seeing the agents before I move your Lordships to proceed to judgment in the precise terms in which it should be entered. I am, however, of opinion that this judgment ought to be affirmed; and I humbly submit, that if your Lordships concur in that opinion, in some way or other this House must take care to provide that the party who has not failed, shall have full costs paid to him by the party who has failed.

Appellants' Authorities.—Wight, 340.—Bell on Elect. 489.—Glass, Feb. 28. 1754, (1857); Wight, 356.

Respondents' Authorities.—16 Geo. II. ch. 11. § 4.—Young, January 1766, (Wight, 339.)—Robb, Feb. 17, 1785, (Bell, 493.)—Henderson, July 3, 1821.—(1. Shaw and Bal. No. 125.)—Wight, 340.—Coutts and Others, Feb. 17, 1747, (Wight, 358.) —4 Ersk. 1. 18.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNEL, —Solicitors.

No. 41.

J. NAPIER, Appellant.—*Keay.*
A. CROMBIE, (for Lady GORDON,) Appellant.—*Wetherell.*
W. G. SCOTT and Others, Respondents.—*Murray—Bligh.*

Fee and Liferent—Competition.—A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be liferented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive,) and the price not having been paid,—Held (affirming the judgment of the Court of Session)—1, That the fee belonged to the children, and not to their parents;—and, 2. That they were preferable on the price to the heirs ab intestato of the seller.

May 14, 1827. 1ST DIVISION. Lord Alloway.

THE late William Glendonwyn, proprietor of the estates of Parton and Crogo, entered into a transaction with his son-in-law, Mr Scott, by which he agreed to sell the property to him,

under burden of the price. This was carried into effect by a missive, executed in duplicate, by which Mr Glendonwyn conveyed the estate to Mr Scott, who bound and obliged himself 'to 'make payment to the said William Glendonwyn, and his fore-'said of the sum of L.60,500 sterling, as the price of the said lands 'and estates in the parish of Parton, at the terms, in the way 'and manner, and by the proportions, after mentioned; viz. the 'sum of L.20,500 sterling at any time upon receiving one 'year's previous notice after the said term of entry, the said 'William Glendonwyn discharging the said estate from the 'burden of this said sum upon receipt thereof; and the sum of 'L.30,000 sterling at the expiry of one year after the death of 'the said William Glendonwyn, with the interest, at the rate 'of 4½ per cent, of the said sums of L.20,500 sterling and 'L.30,000 sterling, before mentioned, from the said term of 'Whitsunday 1810 to the respective terms of payment before 'written, and in all time thereafter during the not-payment.' And further, 'declaring, that, during the life of the said Wil-'liam Glendonwyn, no interest shall be payable by the said 'William Scott upon the remaining sum of L.10,000, which 'principal sum of L.10,000 sterling is to be secured to the said 'William Scott and Mrs Ismene Magdalene Glendonwyn alias 'Scott, daughter of the said William Glendonwyn, and spouse 'of the said William Scott, in manner following; viz. The interest 'of the said sum is to be liferented by the said William Scott, 'and Mrs Ismene Magdalene Scott his spouse, during their lives, 'and during the life of the survivor of them; and the said prin-'cipal sum of L.10,000 to be the property of, and divisible 'amongst the issue of the marriage, male and female, as their 'said parents may jointly direct by any settlement under their 'hands, and in default of such direction amongst the said issue, 'as the survivor may direct by deed or will, and in default of 'issue, as the said Mrs Ismene Magdalene Glendonwyn alias 'Scott may direct by her own will and settlement: And fur-'ther, the said William Glendonwyn, out of the said interest, 'promises to pay to his daughter, the said Mrs Ismene Magda-'lene Glendonwyn alias Scott, during his life, the sum of L.200 'sterling yearly for her own separate use, free from the debts 'or control of her present or any future husband, as in the 'nature of pin-money; and further, that the said sum of 'L.200 sterling yearly is to be secured to the said Mrs Ismene 'Magdalene Glendonwyn Scott in like manner, by the sum of 'L.4000 sterling being retained out of the said sum of L.30,000 'sterling; and the said sum of L.4000 sterling shall be the ab-

May 14, 1827.

May 14, 1827. 'solute property of the said Mrs Ismene Magdalene Glendon-
'wyn Scott, and which she shall have the power of conveying
'and settling at her pleasure, to take effect after her death:
'Declaring always, that the disposition to be granted by the
'said William Glendonwyn of his said lands and estate in the
'parish of Parton shall be specially burdened with the pay-
'ment of the foresaid price of L.60,500 sterling, and all inte-
'rest to become due thereon, payable in manner before stipu-
'lated; and the same shall remain a real lien and nexus over
'the said lands and estates, and preferable to all other debts and
'deeds.' A few days prior to the execution of it, Mr Glendon-wyn had addressed a letter to his agent, in which, in reference to it, he stated that 'I find it expedient to delay no longer ma-
'king a settlement of my affairs, and in that measure have pro-
'posed a transaction with one of my sons-in-law, William Scott,
'Esq. barrister, for the estate of Crogo.' No power of revocation was reserved, and a duplicate of the missive was delivered to Mr Scott, who took possession of the estate, and proceeded to make improvements on it. At this time there was a son in existence of the marriage between Mr Scott and the daughter of Mr Glendonwyn, and soon thereafter Mr Glendonwyn died, having made no other settlement of his affairs; and having left three daughters, namely, Lady Gordon, Miss Glendonwyn, and Mrs Scott. After an unsuccessful attempt on the part of Lady Gordon to set aside the transaction, a disposition, in terms of the missive, was executed by her in favour of Mr Scott, in virtue of which he was infeft, and obtained possession. Having afterwards become insolvent, and having paid no part of the price, a process of ranking and sale of his estates was instituted, in which various claims were made; and in particular a claim was lodged by Mr Crombie, as assignee and on behalf of Lady Gordon, one of the three heirs-portioners, for a third share of the price, and another by Mr Napier of Mollance, as assignee to Mrs Scott's third share, and also as having right in the same character to the L.10,000. The common agent having ranked Napier as in right of the L.10,000, and made it preferable to the claim of Lady Gordon, appearance was entered by the children of Mr Scott, who insisted that the L.10,000 belonged to them; and objections were stated on behalf of Lady Gordon to the mode of ranking. The Lord Ordinary having reported the case on informations, it was contended by Napier, that the fee of the L.10,000 was vested in Mrs Scott, and now belonged to him as her assignee. On the other hand, it was maintained by the children,—1. That the assignation on

which Napier founded conveyed only Mrs Scott's share as an heir-portioner, and not the specific sum of L.10,000, and therefore he had no title on which to compete for this sum.—2. That it was evident, from the whole tenor of the deed, that it was the intention of Mr Glendonwyn that the L.10,000 should belong to them; that accordingly he declared that the 'property' of that sum should be vested in them, and that their parents should only have right to the interest during their lives, with a power of division, and a substitution to Mrs Scott in the event of failure of issue.—3. That, independent of the intention of Mr Glendonwyn, the legal construction of the deed was in their favour, because one of the children having been in existence at the date of its execution, the fee immediately vested in him, subject to the emerging claims of future issue;—and, 4. That at all events, as there was no conveyance of the capital sum itself to the parents, but merely of a right to the fruits, it remained in hæreditate jacente of Mr Glendonwyn, liable to be taken up by the children at any period, as heirs of provision. May 14, 1827.

On the part of Lady Gordon it was contended,—1. That whether the fee belonged to Mrs Scott or to the children, the L.10,000 could not be ranked preferably to her share of the price as an heir-portioner, and, as such, a creditor of Mr Scott;—and, 2. That, on the contrary, she had right to a preference, because the missive being a deed inter vivos, conveying the estate to Mr Scott under condition of payment of the price, and he having failed to do so, neither he nor his family could make any claim until he had implemented his part of the transaction. To this it was answered by the children, that the missive was to be regarded as a combination of two deeds,—the one relating to the sale of the property, and the other being a settlement by Mr Glendonwyn of his affairs; that in this question it was to be regarded in the latter view; and that Mr Glendonwyn having bequeathed to them the L.10,000, they, as special legatees, were entitled to payment, in preference to the heirs ab intestato. The Court found, 'that the fee of the sum of L.10,000 provided 'by the deceased William Glendonwyn, Esq. in the instru-'ment mentioned in process, dated 22d April 1809, belongs 'to William Glendonwyn Scott, and the other children of the 'said William Scott, and Ismene Magdalene Glendonwyn, his 'spouse; that John Napier has no right to the said sum, and 'repelled his claim thereto; sustained the objections made by 'the said William Glendonwyn Scott and the other children, 'and their tutor ad litem, to the ranking proposed by the com-'mon agent: Found that they were entitled to be ranked upon

May 14, 1827. 'the fund in medio, preferably to the heirs-portioners of the said 'deceased William Glendonwyn, and those deriving right from 'them, for the said principal sum of L.10,000, payable at the 'death of the last survivor of their said parents, with the lawful 'interest thereof during the not-payment, and ordained them to 'be ranked accordingly.' To this interlocutor the Court, on the 14th February 1826, adhered, on advising petitions with answers.*

Crombie and Napier, each entered an appeal.

Appellant. (NAPIER.)—It is a rule of the law of Scotland, placed beyond doubt by a long series of authorities, that a destination to parents in liferent, and to their children generally, without naming them, in fee, does in legal construction vest the fee as well as the liferent in the parents. This construction has probably arisen from an ancient maxim, that a fee cannot be in pendente; and as it must necessarily vest somewhere, and cannot vest in parties who are not at the time in existence, or are not named, therefore the fee must necessarily vest in the parents, although ex figura verborum the liferent only is conveyed to them. The only mode in which the right of the parents can be limited to a liferent, is by its being expressly restricted to a right of that nature by the word 'allenarly.' But there is here no such restrictive word, in regard to the rights of Mr and Mrs Scott. On the contrary, the liferent is destined to them, and the fee or property (which terms are synonymous) to their children,—being exactly that destination which, according to all the authorities, vests the fee in the parents, or in one or other of them.

But the matter does not rest here; for the evident design of the maker of the deed was to give the fee to the parents. Mr Glendonwyn expressly directs the L.10,000 to be secured 'to the 'said William Scott and Mrs Ismene Magdalene Glendonwyn 'Scott,' and to them only, without any mention of the children in this part of the clause. The subsequent directions as to the liferent and fee merely regulate the mode in which the money is to be secured to Mr and Mrs Scott, being that mode which, according to the law of Scotland, vests the fee in the parents, and under which the right of the children resolves into a spes successionis, protected against the gratuitous but not the onerous deed and obligation of the parents. This was, therefore, the most proper mode of accomplishing Mr Glendonwyn's

* See 4 Shaw and Dunlop, No. 301.

avowed intention to secure the L.10,000 to his daughter and son-in-law: and, correctly speaking, the fee was vested in the former, because the L.10,000 were provided by her father, and were placed at her disposal on the failure of children of the marriage. May 14, 1827.

The plea, that there was a child in existence at the date of the deed, does not alter the case; because the fee was not taken in his favour nominatim. Neither is there any foundation for the plea, that the fee remained in hæreditate jacente of Mr Glendonwyn, and that the children are entitled to take it up as heirs of provision. By the tenor of the deed, it is plain that Mr Glendonwyn was divested, and consequently the fee could not remain in hæreditate jacente of him, and therefore it must have vested in some one; so that the question just returns to the point, as to whether the fee, by construction of law, was in the parents or the children. In regard to this point, it was not relevant to inquire into the intentions of Mr Glendonwyn; because the words employed by him had a fixed and technical meaning, which could not be contradicted by going into extraneous circumstances, indicative of an intention at variance with their established meaning.

Respondents.—1. The appellant, Napier, has no title to the L.10,000, and therefore no right to compete for it. Under the deed, Mrs Scott, according to his own plea, had two species of rights,—one as a legatee, or singular successor in regard to the L.10,000,—and the other as one of three heirs-portioners, in relation to the residue of the price. But, by the assignation founded on by him, she merely conveyed her right as an heir-portioner, without any mention of her right as assignee; and consequently, if the L.10,000 belonged to her, she had not conveyed that sum to him.

2. But the fee was not vested in her. On the contrary, it belonged to the respondents, both according to the legal construction of the words of the deed, and the will and intention of Mr Glendonwyn.

All the cases in which it has been found, that although ex figura verborum there was only a liferent, yet there was truly a fee, are essentially different from the present. In all of them, whether relating to land, houses, or money-bonds, there was an actual divestiture of the granter and conveyance of the *subject itself* to the disponee, accompanied by an apparent limitation of the right of property; and the question of law which always arose in such cases was, whether the right had been effec-

May 14, 1827. tually *limited*, or whether it must be held to be absolute and unbounded. Now, the Court seeing that the fee was no longer in the granter, or his hæreditas jacens, and that there was no person in existence in whom it could vest, held ex necessitate juris, that as the subject itself had been conveyed to the disponee, he must have right to the fee, although ex figura verborum his title was limited to that of a liferent.

But, in the present case, Mr Glendonwyn did not convey the principal subject either to Mr or Mrs Scott, and consequently this formed an important distinction from all the former cases. All that he gave to them was the enjoyment of the annual rent or interest, while he disposed of the subject itself in another way.

Besides, even if the party to whom the fee was provided had not been in existence, the fee would not therefore have vested in the liferenter of the produce or annual rent. It would have remained in hæreditate jacente of the granter, liable to be taken up by the person to whom it was destined, so soon as he came into existence.

Accordingly, in this case Mr Glendonwyn did not divest himself of the L.10,000 in favour of Mr and Mrs Scott, but only declared that it should be secured to the effect, first, of providing to them the annual rent, and secondly, of giving the property to the issue of the marriage. It follows, therefore, that, if there had been no one in existence to take up the fee at his death, it would not ex necessitate juris have vested either in Mr or Mrs Scott, but would have remained in hæreditate jacente of Mr Glendonwyn, liable to be taken up by the issue of the marriage. But, in point of fact, there was a child in existence, in whom the fee vested, subject to the emerging claims of future issue.

Even supposing, however, that the L.10,000 had been conveyed to Mr and Mrs Scott, still there are words sufficient to constitute a fiduciary fee. The term 'allenarly' is not indispensable, but may be supported by others equally strong. Now, in the deed it is declared, that the parents shall have right only to the interest,—that it shall be liferented by them,—that this liferent shall subsist only during their lives, and that of the survivor; and although, no doubt, a power of division was conferred on Mrs Scott, this could not bestow on her the property of the subject itself.

If, however, there were any doubt as to the legal effect of the words, the intention of Mr Glendonwyn was manifest, both from the whole scope of the deed itself, and from the peculiar circumstances in which the family of Mrs Scott stood. If he had

intended to give the L.10,000 either to Mr or Mrs Scott, he would not have laid him under an obligation to pay it, but would have deducted it from the price; or he would have employed the same words as he did in relation to the provision of L.4000 to Mrs Scott, which he declared should be 'her property.' May 14, 1827.

Appellant. (CROMBIE.)—The missive was not a proper mortis causa deed, but properly one inter vivos. By it a provision of L.10,000 was made to the family of Mr Scott the purchaser, who therefore was, in the event of duly implementing his part of the contract, to retain it on their behalf. On the one hand, therefore, Mr Glendonwyn and his representatives were constituted creditors of Mr Scott for the price, less the L.10,000; and his children, on the other, became his creditors for that sum. It is plain, therefore, that the representatives of Mr Glendonwyn, and these children, stand in pari casu; and consequently, the latter cannot be entitled to be preferred to the former. But farther, as these children were only to have right to the L.10,000, on the supposition that Mr Scott performed his part of the contract, by paying the residue of the price, and as he had failed to do so, the representatives of Mr Glendonwyn, and the appellant, as in right of one of them, was entitled to be preferred to those children.

Respondents.—The missive may be regarded either as a mortis causa deed, or as one inter vivos. In either case, the respondents are entitled to be preferred to the appellant, who does not dispute that the provision of L.10,000 belongs to them, but merely that they are not preferable on the fund in medio. If the deed be considered as one mortis causa, then, as the respondents are special legatees, and as the appellant claims in right of an heir-portioner, they are manifestly preferable; because, it is fixed law that a legatee, who succeeds by the express will of the testator, must be paid before an heir who succeeds merely to the residue by his presumed will. In the next place, and regarding the missive as a deed inter vivos, as it was an onerous contract, containing no power of revocation, and which was delivered and acted on, the respondents acquired right as creditors to the L.10,000, on the principle of jus quæsitum tertio; and if so, then, as creditors, they were entitled to be preferred to the appellant, who claimed as an heir-portioner. The construction put by him on the deed, was unwarranted by its terms. No power was given to Mr Scott to retain the L.10,000. On the contrary, he was bound to pay the full price; and Mr

May 14, 1827. Glendonwyn appropriated L.10,000 out of it to the respondents, without any condition as to whether Mr Scott should implement his part of the contract or not. They were, therefore, vested in the L.10,000; and, as special legatees in the one view, or as creditors in the other, were entitled to be preferred.

The House of Lords, in each of the cases ordered and adjudged, 'That the said interlocutors therein complained of, be 'and are hereby affirmed; and it is further ordered, that the 'appellants do pay, or cause to be paid, to the said respondents, 'the sum of L.100 for their costs, in respect to said appeal.'*

Napier's Authorities.—(3.)—Stair, 328; Mack. 233; 1 Bell, 43; Frog, Nov. 25, 1735, (4246); Lillie, Feb. 24, 1741, (4267); Douglas, July 7, 1761, (4269); Cuthbertson, March 1, 1781, (4279); Dict. Fiar Ab. and Lim. and Prov. to Heirs, &c.

Scotts' Authorities.—(2.)—Bell's Cases, p. 55; Newlands, July 9, 1794, (4294); M'Intosh, Jan. 28, 1812, (F. C.);—Gerran, June 14, 1781, (4402); Signet Cases, p. 56.—(4.)—1 Bank. 9, 18; 3 Erak. 8, 2; 3 Erak. 3, 91; 3 Stair, 4, 2; 1 Stair, 20, 5; 3 Erak. 3, 91; 1 Bell, 243; Gartland, 8 March 1632, (915); Clark, June 30, 1675, (917); Meldrum, 11 Dec. 1667, (928): 1 Stair, 5, 6.

SPOTTISWOODE & ROBERTSON, J. DALLAS, and J. CHALMERS, —Solicitors.

No. 42. Rev. ROBERT MOORE, Appellant.—*Connell—Keay—Stuart.*
ALEXANDER HEPBURN MURRAY BELCHES, Esq. Respondent.—*Spankie—Campbell.*

Grass Glebe.—Stat. 1663, *c.* 21.—A Presbytery having designed, under the above statute, to the minister of the parish a grass glebe out of kirk lands belonging to one of the heritors, whose mansion-house had formerly been built on them; and the Court of Session, (altering the judgment of the Lord Ordinary,) having found that the heritor was entitled to object to those lands being so designed, and that the minister was bound to accept a glebe out of other lands, which were not kirk lands, but which

---

* After the death of Lord Gifford, and the resignation of the Lord Chancellor Eldon, the Lord Chief-Baron Alexander, and the Master of the Rolls, Sir John Leach, were appointed to hear appeals from Scotland; but as their Lordships had not the privilege of delivering their opinions in the House of Lords, the Reporters have been unable, in several Cases, to give the grounds on which the judgments were pronounced, except so far as they could ascertain them from the observations which occasionally fell from their Lordships in the course of the debate at the bar. Their Lordships generally communicated their opinions in a private room to the parties; and of which the Reporters have, in some instances, obtained notes.

The above case of Napier was heard by the Lord Chief Baron.

were alleged to be equally as good and convenient as those designed by the Presbytery, and that he was not entitled to a compensation for the want of a glebe during the litigation, Held, (reversing the judgment of the Court, but affirming that of the Lord Ordinary,) That the minister was entitled to have the glebe designed out of the kirk lands, and to a compensation for the want of it.

May 21, 1827.

1st Division. Lords Gillies and Meadowbank.

The Presbytery of Dunbar designed four and a half acres of the kirk lands of Blackcastle, the property of Alexander Hepburn Murray Belches, Esq. of Invermay, as a grass glebe to the Rev. Robert Moore, minister of the parish of Oldhamstocks. To this designation Mr Belches objected, and suspended, on various grounds; but principally because the lands designed were the site of the old manor-house of Blackcastle, now in ruins, and offered in lieu thereof a grass glebe at some distance, which he alleged was equally good and convenient. The case having come before Lord Gillies, his Lordship at first sustained the reasons of suspension, but on a representation by Mr Moore, he altered and repelled the reasons. Against this judgment Mr Belches represented, and having alleged that the lands which had been designed were arable and not pasture lands, his Lordship remitted to Mr Turnbull, a person of skill, to inspect them, which he accordingly did, and reported that they were pasture lands, and that it would require six acres of them to pasture a horse and two cows. Objections having been made by Mr Belches to this report, Lord Meadowbank, (before whom the case had now come,) on the 13th of May 1823, approved of the report, repelled the objections, found the letters orderly proceeded, and expenses due, and at the same time issued this note of his opinion:—'The lands in question have undoubtedly been 'subjected to cultivation, but that only to render their being 'employed as grass lands more beneficial. They are, therefore, 'according to the admissions of the suspender, exactly in the 'predicament of those which were designed in the case of 'Maule, 18th May 1809; and as to the objection of their lying 'adjacent to the manor-place, the allegations do not appear to 'the Lord Ordinary to be of that description that would authorize the Court to hold that they are to be exempted from the 'burden in question, to which, by law, they otherwise must be 'subjected.'

Mr Belches having reclaimed, the Court, before answer, appointed him to give in a condescendence 'of the grounds he offers 'to have designed as a grass glebe for the respondent, (Mr Moore,) 'instead of the ground designed by the Presbytery;' and having done so, their Lordships remitted to Mr Turnbull to report 'how far the ground condescended on was adapted, by facility

May 21, 1827. ‘ of access, juxtaposition, and other circumstances of situation, ‘ to be a convenient grass glebe.’ Mr Turnbull having reported that the proposed grounds were suitable, the Court adhered, turned the decree into a libel, and ordained the inspector to report as to the quantity of land requisite for a glebe, and to specify the situation and boundaries thereof. He then reported that there were impediments to designing a grass glebe; and among others, that the lands proposed were completely surrounded by an undivided common. Mr Belches then offered to guarantee a road through the common; and the Court, before answer, remitted again to Mr Turnbull to report as to the quantity, situation, and boundaries, and to line off a road. A report was accordingly made by him, on which he suggested that eight acres of the farm of Woollands, exclusive of certain roads, should be allotted as the grass glebe; reserving to the minister a right to the road leading from Oldhamstocks to the Woollands, and through the undivided common that lay interjected between them. The Court approved of this report, designed, allotted, and set apart the grounds described in said report, ‘ with the ‘ road or access thereto, and lying and bounded as therein spe‘ cified and here referred to, to be the grass glebe for the char‘ ger the present minister of Oldhamstocks, and his successors ‘ serving the cure of the said parish in all time coming, and ‘ decern and declare accordingly, but find no expenses due to ‘ either party.’

Mr Moore reclaimed, praying the Court to repel the reasons of suspension, or at all events to grant to him a pecuniary compensation for the want of a glebe since the designation by the Presbytery. The Court, however, on the 23d of December, 1825, refused the petition and adhered.*

Mr Moore appealed.

Appellant.—By the act 1663, c. 21, a minister is entitled to have a grass glebe designed to him out of the kirk lands nearest to the manse; and the heriter is not entitled to defeat the enactment by an offer of other lands, not kirk lands, and less convenient in point of situation and in other respects. The object of the legislature was to give an indefeasible right to the minister to such lands as had formerly belonged to the church establishment; and accordingly those lands are first pointed out

* See 4 Shaw and Dunlop, No. 244.

for designation, which had originally been more immediately connected with the parochial cure—and in point of situation 'maist ewest' (nearest) to the church. In the present case, the lands designed by the Presbytery once belonged to the old parsonage of the parish, and are therefore the most eligible under the word and spirit of the statutes. On the other hand, the grounds offered by the respondent, and designed by the Court, are ill calculated for a glebe, and greatly inferior to that designed by the Presbytery. Part of it is a bank, inaccessible to cows and horses—a river intervenes—the access is circuitous, and even the possession of that access is precarious, being through an undivided common, separating the proposed glebe from the manse; and it is quite uncertain whether the portion bisected by the road, will, on division, fall to the share of the respondent. It is plain the respondent cannot guarantee a road through an undivided commonty, nor could the Court guarantee it. The objection that the lands designed by the Presbytery contain the site of the old manor-house of the parsonage of Blackcastle, is neither correct nor relevant. There are only a few stones and a shattered staircase, the remains of the parsonage-house, which has been a ruin for one hundred and fifty years. There are no trees round them. The spot is in the extreme corner of the estate, and there is neither the inducement of beauty nor convenience to lead a proprietor to build upon it for a family residence. But even if the place were better suited for that purpose, this is not a ground of exception that can be listened to. At all events, the appellant was entitled to compensation. The Presbytery could not have designed other lands than they did, and the lands substituted by the Court, at the respondent's request, were not offered till long after the commencement of the litigation, and even then the substitution was made for the respondent's own convenience. May 21, 1827.

Respondent.—The glebe designed by the Presbytery lies within the old garden wall, which encloses the outer park of the castle, and comes close to its front. This is an insuperable objection to its designation. It is no answer that the castle is in ruins. That does not render the situation less suitable for a mansion-house, either consisting of a new erection, or the old house repaired. In the substitution made by the Court, the appellant obtains a designation perfectly suitable for the purpose in view. The circuit of the road is trifling. The road itself is guaranteed, and has been lined off. Even although there

May 21, 1827. were within the space an inaccessible bank, still a portion of ground, sufficient to pasture two cows and a horse, has been measured off, and the distance from the manse is not inconvenient. The danger of being disturbed in possession of the road through the common is quite imaginary. Compensation is never given to a clergyman except where he has been successful in the litigation which the heritor has struggled to protract. Here the appellant only gets what long ago was offered to him, and what he ought never to have rejected. It is of no consequence that the designation by the Court does not embrace kirk-lands. The object of the statute was to prefer kirk-lands, only if there were no valid and sufficient objection to their being allotted; not to make it peremptory on the Presbytery to allot them and no others, under any circumstances, and however inconvenient and injurious to the heritor.

The House of Lords ordered and adjudged, 'That the said 'several interlocutors complained of in the said appeal be, and 'the same are hereby reversed; and it is farther ordered, that 'the interlocutor of the Lord Ordinary, dated the 13th May, '1823, be, and the same is hereby affirmed; and it is further 'ordered, that the cause be remitted back to the Court of Ses-'sion, to fix the time for the appellant's entry to the *glebe* de-'signed by the Presbytery; and it is declared, that the appel-'lant is entitled to a pecuniary compensation for the want of a 'glebe; and it is further ordered, that the said Court of Ses-'sion do fix the time from which the same shall be calculated, 'and do ascertain the amount of such compensation, and pro-'ceed therein as shall be just.'*

Appellant's Authorities.—1663. c. 21.—1672. 2. 48.—1587. c. 29.—1693. c. 16. Cuningham, Jan. 6, 1594 (5135).—1594. c. 202,—Earl of Galloway, June 12, 1823, (2. Shaw and Dunlop, No. 373.)—Dundas, Feb. 3, 1808, (not reported.)—A branch of the same cause, Dec. 6, 1805, (Fac. Coll.)—2. Ersk. Inst. 10. § —Steele, July 27, 1748 (5161.)—Hodges, Feb. 27, 1756 (5162.)

Respondent's Authorities.—Marshall, June 20, 1605 (3495.)—Connel's Law of Parishes, p. 423.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNEL, —Solicitors.

* The Lord Chief Baron heard this appeal.

JOHN LANG, Writer, Appellant.—*Keay—John Campbell.* No. 43.

STRUTHERS and Others, Respondents.—*Adam.*

Reparation—Agent and Client.—Held, (affirming the judgment of the Court of Session,) that a law agent was liable for loss arising from an heritable security being ineffectually completed, although drawn on the employment of the granter of the deed, and not of the lender of the money.

May 28, 1827.

2D DIVISION.

Lord Mackenzie.

SIR JAMES COLQUHOUN conveyed to Henry Bell certain heritable subjects, at Helensburgh, in Dumbartonshire, by a feu-charter containing this clause:—'Declaring always, as it is 'hereby expressly provided and declared, that it shall not be 'competent to, nor in the power of the said Henry Bell, or his 'foresaids, to subfeu, sell, or dispose of any part of the said 'piece of ground hereby feued out, or buildings to be erected 'thereon, to be holden of him or his foresaids, or of any other 'interjected superiors; but allenarly, to be holden of and under 'the said Sir James Colquhoun and his foresaids, in all time 'coming; without prejudice, nevertheless, to the said Henry 'Bell, or his foresaids, to grant securities upon the foresaid pro-'perty, or to exercise any other right of ownership which may 'not be inconsistent with the manner of holding hereby pre-'scribed.'

On this property Bell erected hot and cold baths, and other buildings, and in this speculation Archibald Newbigging, merchant in Glasgow, had an interest. These parties being desirous to obtain a loan of L.1200, entered into a transaction with Young and others, the tutors and curators of Jean Struthers and others, who were minors, by which it was agreed, that the latter should advance the money on receiving a security over the property feued by Bell. Accordingly, Mr Newbigging employed Mr John Lang, writer in Glasgow, his ordinary agent, to frame the deeds necessary for this purpose, in consequence of which he prepared an heritable bond and disposition in security by Bell, to James Young and William Struthers, as tutors and curators for Jean Struthers, and to Jean Struthers and others themselves, conveying in common form the above feus, (under a right of redemption in favour of Bell and Newbigging,) with power to the Struthers to bring the subjects to sale, and to draw the price, if payment of principal and interest should not be duly made. In framing the deed, Lang expressed the obligation to infeft, and the tenendas clause, in these terms:—'I,

May 28, 1827. 'the said Henry Bell, bind and oblige myself, and my foresaids, 'on our own charges and expenses, to infeft and seise my said 'disponees and their aforesaids, in the said lands, baths, offices, 'buildings, and pertinents above disponed, to be holden of and 'under the said Sir James Colquhoun and his aforesaids, and 'immediate lawful superiors thereof, for payment of the feu-'duties, and casualties of superiority, and under the conditions 'specified in the feu-contract and disposition of said piece of 'ground, granted to me by the said Sir James Colquhoun, and 'that either by charters of resignation or confirmation, or both 'ways, the one without prejudice of the other. For effectuating 'which infeftment by resignation, I, the said Henry Bell, make 'and constitute,' &c. An indefinite precept of seisin was then inserted, which was followed by seisin and registration. The bond, so far as it contained an acknowledgment for the money, and an obligation for repayment, was granted also by Newbigging, who accordingly subscribed it along with Bell.

Thereafter, Lang prepared another heritable bond, by Bell to Newbigging, for L.2000 over the same subjects, and in the same terms, which was also completed by seisin and registration.

The bond to the Struthers, with the seisin, remained for a few months in the hands of Lang, who then delivered them to Newbigging. In 1811, these deeds were returned to Lang by the tutors, as their agent, and remained with him until 1818, when they were delivered to the tutors. In 1819 Newbigging became bankrupt, and was sequestrated, having previously disponed, for value, Bell's bond for L.2000, to himself and others, as trustees for Mrs Bogle. The particular manner of holding under which this conveyance had been made, having been observed by their agent, he applied to, and obtained from Sir James Colquhoun, in January 1821, a charter of confirmation, of the conveyances and infeftments in their favour.

The subjects, thus burdened by these two bonds, were, in October 1821, sold by Newbigging's trustee for L.1800, and the purchaser brought an action of multiplepoinding of the price.

The Struthers being advised that the confirmation obtained by Bogle's trustees, had made the L.2000 bond a security preferable to the one in their favour for L.1200, and the fund in medio not being sufficient to pay the L.2000 bond, did not make appearance, but intimated to Lang, that, as they held him responsible, he might do so if he thought fit; and they then raised an action against him for payment of the L.1200, with

interest, or at least for indemnity 'of all loss, damage, and ex- May 28, 1827.
'pense which they had sustained, or may sustain, in consequence
'of their security being postponed in and through the said John
'Lang having improperly omitted, or neglected, to render said
'heritable security in favour of the pursuers legally valid, and
'effectual, and preferable to all posterior securities over said
'subjects,' with expenses.

This action came at first before Lord Alloway, who found Lang liable; but thereafter, on its being explained that he had appeared in the multiplepoinding depending before Lord Mackenzie, Lord Alloway remitted the process to him; and the processes having been conjoined, Lord Mackenzie 'found, that 'in consequence of the insufficiency of the heritable security 'executed by the defender, the pursuers have lost the preference 'which they would otherwise have had upon the price of the 'piece of land libelled, and subjects thereon, by virtue of which 'preference they would have drawn full payment of the debt of 'L.1200 libelled on, with interest; whereas they will now draw 'nothing from the said piece of land, and subjects thereon. 'Therefore, finds the defender liable to the pursuers in pay-'ment of the said debt and interest thereon, of which ordains 'the pursuer to give in a precise state, as far as relates to the 'interest already due. But finds, on receiving said payment, 'the pursuers are bound, in case the defender shall desire it, to 'assign over to the defender their rights to the said debt and 'interest thereon, in order to his operating his relief from any 'other fund of the debtor, if any there be,' and found expenses due. To this judgment the Court, on the 2d February 1826, adhered.*

Lang appealed.

Appellant.—The appellant was employed by Newbigging, and did all he was desired to do. He had no authority to take confirmation, and was not bound to act beyond his instructions—a mandatory must act intra fines mandati. No consideration of utility, or benefit to his employer, will warrant a deviation from instructions. Much more is this clear with a third party who did not employ the agent. The appellant occasionally had done trifling matters of business for the respondents, but was not their ordinary agent, and in this matter was not employed

* See 4 Shaw and Dunlop, No. 281, for the opinions of the Judges.

May 28, 1827. by them. The deeds, shortly after their execution, were delivered up to Newbigging, and when the tutors of the respondents replaced them in the appellant's hands, they gave him no directions to obtain confirmation, but after some years received them back in the same state they were when so deposited. But a law agent, even if bound to go farther than the express instruction of his employer, is not under any obligation to take so expensive a step as confirmation, unless money be placed in his hands for that purpose. Even if the appellant had erred in framing the deed, or in not obtaining confirmation, he is not liable if he entertained an incorrect view of a matter attended with difficulty. It is not required of a law agent that he possess the highest degree of skill which any member of his profession can possibly attain; and if he exercises a reasonable degree of skill and prudence, he will be exonerated. But the First Division of the Court of Session had entertained great difficulty in a similar case, Rowand and Campbell; a hearing in presence having been ordered, and the Judges divided in opinion. In a case, therefore, like the present, where it is not clear that the appellant was wrong; or rather, where it is, on sound legal principles, clear that he was right; and where it is the customary practice for conveyancers in his neighbourhood, to draw similar deeds in the shape he adopted, it is impossible to make him liable. Besides, it is important that, de facto, no money was advanced by the Struthers' tutors, and this the appellant was ready to prove, but was not permitted.

Respondents.—The appellant was employed, for a pecuniary remuneration or hire, to frame a deed of security for the respondents. He had been their agent previously, and continued to be so. It is of no importance who conveyed the instructions. His duty was, to see that a deed was drawn and executed in such a shape and manner as to be a perfect security. It matters not that Newbigging gave no directions as to confirmation. The appellant, as a professional man, knew, or ought to have known, that a confirmation was necessary, and that without it all that had been done was null and void. If he neglected taking that step, either from oversight or ignorance, he is responsible to the person for whose behoof he framed the deed. A conveyancer is employed because ordinary persons are ignorant of his art, and rely on his skill and accuracy. They cannot direct him; but by accepting the employment, he undertakes to do what is needful for their safety. As to having money in hand before obtaining confirmation, there was no need of a charter if

the deed had been properly framed. He might have framed the security with a double manner of holding, or might have granted a precept that the subject might be held feu of the granter. But having so shaped the deed, that it admitted only a public infeftment under the superior of the lands, if money had been required to purchase a charter of confirmation, he should have asked his employer for it; but he remained silent; and knowing the security could be defeated, allowed the respondents to believe they were perfectly secure. The appellant cannot shelter himself under the cover, that the highest degree of skill is not expected from a professional man. No extreme degree of skill was necessary. The most ordinary elementary book would have put him right. For oversight or neglect he has no excuse; and ignorance of the rules of business afford no defence against the claims of the party injured. The respondents were not aware of the defect. If the appellant had done his duty, there would have been no defect existing; value had been given for the bond. That value is declared received. The deed is probative—has been followed by seisin—interest was regularly paid for eight years; and therefore the pretence of no value is unfounded, and at all events cannot be listened to from the appellant. May 20, 1827.

The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed, with L.100 costs.*

Appellant's Authorities.—Clyne, Jan. 16, 1823. (2 Shaw and Dunlop, No. 118.)—Stewart, Nov. 12, 1794. (15027.)—Skinner, May 31, 1823. (2 Shaw and Dunlop, No. 338.)—Bell's Abstract of Deeds, p. 148—2 Stair's Inst. 3, 14.—2 Bank. Inst. 3, 9.—2 Erak. Inst. 8, 34.—Campbell, Jan. 15, 1663. (1302.) 1693, c. 13.—Rowand, June 30, 1824. (3 Shaw and Dunlop, No. 141.)—Bell's Com. vol. 1. p. 369.—Grant, Jan. 1, 1791. (Bell's Cases, p. 312.)—MacLean, Nov. 15, 1805. (App. Reparation, 2.)—Burrow's Reports, vol. 4, p. 2060.—Campbell's Reports, vol. 3, p. 17.

Respondents' Authorities.—1457, c. 71.—1503, c. 91.—Craig, de Feudis, 2, 4, 16, 19.—Spottiswoode, tit. 5, § 1.—Bankton's Inst. 2, 3, 46.—Erskine's Inst. 2, 3, 20, —2, 7, 9, et passim.—Russel on Conveyancing, p. 224, 237.—Bell's Abstract of Deeds. p. 148.—Bell on Purchaser's Title, p. 26.—Morison's Synopsis, voce Reparation. (1343.)—Lillie, Dec. 13, 1816. (F. C.)—Douglas, July 3, 1817. (F. C.)—Currie, June 12, 1823. (2 Shaw and Dunlop, No. 362.)

RICHARDSON and CONNELL—A DOBIE, *Solicitors.*

* This appeal was heard by the Master of the Rolls.

No. 44. **Poor MARY M'LEAN, or BRYAN, Appellant.**

ALEXANDER MURDOCH, Respondent.

Mandate—Agent and Client.—Held ex parte, (affirming the judgment of the Court of Session,) in an action at the instance of a law-agent, for payment of his account, that a mandate alleged, but denied, to be signed by the client's mark, together with other circumstances, inferring employment, was sufficient to entitle him to decree against the client.

May 28, 1827. 1st DIVISION. Bill Chamber. Lords Cringletie and Eldin.

MURDOCH, a writer in Ayr, raised an action, before the Sheriff of Ayrshire, against Noble, Morris, Murray, and Mary M'Lean, widow of Bryan, an inn-keeper in Kilmarnock, (who had died bankrupt, and as to whose estate and effects she had along with these individuals entered into an arrangement with Bryan's creditors,) concluding against them, jointly and severally, for payment of L.249, 6s. 9d. said to have been incurred under the professional employment of these defenders. Murdoch relied on a mandate bearing,—'*Kilmarnock, 9th August*, 1819.—As it is necessary that the compositions due on the debts of the late John Bryan be immediately discharged, and money borrowed on the property to do this, we hereby authorize Alexander Murdoch, writer in Ayr, to take measures accordingly; and to borrow money on the security of the house at Kilmarnock, and to act therein as our agent. We are, (Signed) JOHN MURRAY, WILLIAM NOBLE, ARCHIBALD MORRIS, MARY + BRYAN, her mark.' He further alleged, that the defender, Mary Bryan, subsequently attended one of the meetings along with him, when a dividend was paid to the creditors. Murray, Noble, and Morris, made no appearance; but Bryan contended that truly Murdoch was their, not her agent; that he was co-operating with them in a scheme to defeat her just rights; that she never had adhibited her mark to the mandate; and that the pursuer was bound to prove she had, if he meant to rely on it as evidence; that the pursuer did not borrow money over the house, or take any steps for that purpose; that she had attended the meeting to endeavour to bring the creditors to easier terms; and that the other defenders, in their pleadings in another matter, arising out of the arrangement with the creditors, took credit for this very account. The Sheriff decerned against the defenders. The Lord Ordinary on the bills refused two bills of advocation; and a reclaiming petition to the Court was refused on the 23d November, 1824, without answers.*

* See 3 Shaw and Dunlop, No. 205.

M'Lean appealed, and repeated the statements made in the Court below. No appearance was made for the respondent. May 28, 1827.

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed.*

J. DUTHIE, *Solicitor.*

WILLIAM CRAWFURD, Esq. of Cartsburn, Appellant.—*Adam—Wilson.*
HELEN M'CORMICK, and JOHN FAIRIE, her Husband, Respondents.—*Keay—James Campbell.*

No. 45.

General Discharge.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that an agreement between partners in trade relative to company matters, 'to grant full and competent discharges to each other, in full of all bonds, &c., as individuals or partners,' did not embrace a bond by one of the partners to another, relating to a private transaction between themselves.

May 28, 1827.

2D DIVISION.
Lord Pitmilly.

IN the year 1775, previous to the American Revolution, Thomas M'Knight, William Aitchison, James Parker, and William M'Cormick, were concerned as partners in a variety of commercial houses and trading adventures in and from America, under the firm of Thomas M'Knight and Co., Aitchison and Parker, and William M'Cormick and Co. On the declaration of independence, these individuals, being all royalists, except Aitchison, who remained behind, returned to Great Britain. In the confusion of their flight, a great proportion of their books and valuable papers were lost or destroyed, thereby creating almost insuperable difficulties to the ascertaining how their mutual balances stood, and leading to various intricate and tedious accountings.

In 1782, M'Knight alleging that M'Cormick had inter alia L.600 belonging to William M'Cormick and Co., and M'Cormick alleging that M'Knight held a similar sum due to the same company, it was agreed that these sums should be lent on a bond to a third party, in trust for the partners; and a bond was accordingly granted. In November 1786, M'Knight borrowed from M'Cormick L.700, and granted bond to repay the same. This deed bore no reference to the company transactions, and

* The Master of the Rolls heard this appeal.

May 28, 1827. it was averred by M'Cormick that it had no connexion with them. A partial payment of L.850 was subsequently made, and interest was also regularly paid, until about the year 1807, when M'Cormick brought an action against the partners of Thomas M'Knight and Co., of Aitchison and Parker, and the other partners of William M'Cormick and Co., for sums alleged to be due to William M'Cormick and Co. On the other hand, M'Knight brought an action against the partners of William M'Cormick and Co., for payment of sums alleged to be due to Thomas M'Knight and Co. M'Cormick, in support of his claims, brought forward twelve accounts; but the bond of 1786 was not claimed, the actions and accounts being confined to company transactions.

After these actions had depended for several years, and M'Knight having died in 1811, his son and heir, William M'Knight Crawfurd—Mr Parker's son, (who also represented the heir of Mr Aitchison,) and Mr M'Cormick entered into the following agreement:—'At Edinburgh, the 13th day of September, 1811 'years. It is agreed by the subscribing parties, viz. William 'M'Knight Crawfurd, Esq. of Ratho, son, heir, and representa-'tive of his late father, Thomas M'Knight, Esq. of Ratho, Wil-'liam M'Cormick, Esq. of this city, and Charles Stewart 'Parker, of Glasgow, merchant, acting in virtue of a letter from 'his father, James Parker, now residing at Glasgow, the said 'James Parker taking burden on him for himself and the repre-'sentatives of the late William Aitchison of Norfolk in Virgi-'nia, as follows: That whereas the said Thomas M'Knight de-'ceased, William M'Cormick, James Parker, and the said de-'ceased William Aitchison, were engaged in various branches 'of commerce together in America, before, during, and since 'the rebellion in that part of the world, both as copartners and 'individuals, under the various firms of Thomas M'Knight and 'Company, William M'Cormick and Company, and Aitchison 'and Parker, or whatever other firm or firms they, or any of them, 'may have been engaged in, or connected with; and that, owing 'to the rebellion breaking out in America, about the year 1775, 'at the places where their business was conducted, they, or the 'survivors of them, were compelled to abandon their residences 'in America, and fly for refuge to this country, leaving their 'affairs, in consequence of loss of property and vouchers, in a 'state of the greatest intricacy and confusion; and, in conse-'quence of such intricacy and confusion, they were not able to 'agree among themselves as to a final settlement of their various 'accounts as individuals and partners, and were, from this cir-

'cumstance, drawn to the disagreeable alternative of seeking May 20, 1827.
'redress from each other in the courts of law in this kingdom:
'That after a litigation having subsisted between the parties for
'nearly eight years, they, to their mortification, find that they
'are now, after having expended a great part of their substance
'at law, as far, or nearly so, from having their matters brought
'to a final issue, as ever they were: The subscribing parties,
'desirous not only to pass the remainder of their days in peace
'and mutual harmony, and forgiveness of past animosities, but
'to rescue whatever there may remain of the subject in dispute,
'from being swallowed up in further litigation, do hereby so-
'lemnly agree, namely, William M'Knight Crawfurd, Esq. as
'heir and representative of his said deceased father, William
'M'Cormick, and Charles Stewart Parker, acting under autho-
'rity of his said father James Parker, who represents himself,
'as well as the heirs or assignees of the said deceased William
'Aitchison, that from and after the date hereof, there is, and
'shall be, an end of all farther proceedings at law; that they do
'hereby most formally bind and oblige themselves, those whom
'they represent, and their heirs and assignees, to grant full and
'competent discharges to each other, in full, of all bonds, bills,
'notes of hand, and vouchers of any description, either in pro-
'cess in Court, or out of it, whether the same vouchers be
'granted to or by each other, as individuals or partners, or
'whether the same, or any of them, be held by assignment, in-
'dorsation, or otherwise, and to deliver up such vouchers, fully
'cancelled, or that such vouchers, cancelled or uncancelled, be
'hereafter null and void, in or out of any court of law in this
'realm, or elsewhere; in short, to grant each other full and mu-
'tual discharges, on competent stamps, for all demands what-
'ever, and relieve and relinquish any hold they have, or sup-
'pose they may have, on any sums of money anywhere depo-
'sited whatever, with these exceptions only, to wit, who shall
'pay the taxed costs in the reinvestment action; and that in the
'attempt to a final settlement of the affairs of William M'Cor-
'mick and Co. a difference has arisen, to the effect following:
'The said William M'Cormick claims from the said William
'M'Knight Crawfurd and Charles Stewart Parker, representing
'as aforesaid, the sum of L.2500, to be paid by both or either of
'the said William M'Knight Crawfurd, and Charles Stewart
'Parker, in full of all demands whatever; while, on the other
'hand, the said William M'Knight Crawfurd and Charles Stew-
'art Parker contend, that they, or the parties for whom they ap-
'pear, are only liable to pay the said William M'Cormick the

May 28, 1827. 'sum of L.2000 sterling, each one half, in behalf of the parties 'they represent. They therefore agree to submit to arbitration; 'whether the claim should be restricted to L.2000, or L.2500; 'it being understood that it is on no account to be less than 'L.2000, or more than L.2500; and in case it shall be L.2000, 'to be paid in manner hereafter described: each an equal half 'by Mr Crawfurd and Mr Parker; and if the sum awarded 'shall exceed L.2000, to be paid in manner following:—L.1000 'by Mr Crawfurd, L.1000 by Mr Parker, and the remainder by 'both or either of them, as may be awarded by the arbiter or 'arbiters.'

This deed was drawn by Parker, one of the parties.

A submission on the point reserved was accordingly entered into, and in order to enable the arbiter to decide more easily, it was confined to articles contained in three accounts doquetted by the parties, with power to inspect the books and documents from which the accounts were taken; but although the bond of 1782, which related to a company transaction, was included in the accounts, yet that by M'Knight to M'Cormick in 1786, was not so.

By the above arrangement, Crawfurd became at all events liable for L.1000 to M'Cormick, with annual interest until paid, and also for such sum as the arbiter should decree; and on that point no dispute arose. But after M'Cormick's death, on 16th January, 1815, a question occurred, whether the 1786 bond had been extinguished by the agreement and discharge, or whether it was still a subsisting debt.

It appeared that no interest had been paid by M'Knight from 1807 on that bond; and a small sum to account, paid immediately after his death, by his son, had been paid through ignorance that the debt was disputed. On 2d April, 1812, Crawfurd transmitted to M'Cormick a bank order for L.40, 'in terms of the agreement of submission.' Thereafter M'Cormick handed to Stewart (Crawfurd's man of business) a state, including interest on the 1786 bond, along with interest on the L.1000, and giving credit for the partial payment; but mentioning, that, as he did not understand the reference made in the order, he had applied the money 'to the discharge of the 'old interest, and so much towards the new interest on the sign-'ed agreement,' and he sent a receipt accordingly, adding:—'Should Mr Crawfurd object to the payment of the above, or 'any part of it, it shall be rectified.' From November 1812 to November 1814, various sums were transmitted by Crawfurd to M'Cormick, 'as per agreement and submission.' There was no evidence, parole or written, that any demand (other than in the

above state, which Crawfurd alleged had never been communicated to him) directly on the bond had been made, or rejection of the qualification attached to the transmission of the several sums mentioned. May 28, 1827.

After M'Cormick's death, this entry was found in his private books:—'L.350 sterling, balance of the late T. M'Knight of Ratho's bond.' On the other hand, Crawfurd alleged that he had repeatedly mentioned to different individuals, but whom from death, relationship, and agency, (among others, Parker, who was a party to, and who drew the deed,) it was impossible to examine, that this bond had formed subject matter of the agreement, and had, with all the other claims but the one excepted and referred to the arbiter, been discharged and extinguished.

M'Cormick's representatives having raised an action against Crawfurd for payment of the balance of the bond with interest, the Lord Ordinary decerned against him for payment of the principal sum of L.350 sterling, with interest from Martinmas 1811. From an error as to a date, it became necessary that the libel should be amended; which being done, the Lord Ordinary again decerned, conform to the conclusions of the libel as amended, and thereafter adhered; and the Inner-House confirmed that judgment on the 16th May, 1820, by refusing a petition.*

Crawfurd appealed.

Appellant.—The object of all parties was to extinguish and

* The summons was entitled, 'Janet and Helen M'Cormick against William 'M'Knight Crawfurd,'—bore that the late Thomas M'Knight of Ratho had granted the bond—that the pursuers had often required the said *William* M'Knight Crawfurd, now of Ratho, son and heir to the said deceased Thomas M'Knight, to pay. Therefore the said *Thomas M'Knight* Crawfurd, as heir of the deceased Thomas M'Knight, ought and should be ordained, &c. The will was, to pass and charge the said William M'Knight Crawfurd; to hear sentence conform to the conclusions above written, in all points; and execution proceeded against William Crawfurd. The words 'Thomas M'Knight,' in italics, had been a mistake; but in amending the libel, instead of correcting that misnomer, it was allowed to stand; and *William*, in italics, was, when it should not have been, altered to 'Thomas.' The confusion and disconnexion thereby created in the record, seeing that decree went out against the defender, a 'William Crawfurd,' conform to the conclusion of the libel as amended; whereas the conclusion was directed against a 'Thomas M'Knight Crawfurd,' which same person had been required, but refused to pay—was pressed as a ground why judgment of affirmance by the House of Lords could not follow on such a record. But the House did not regard the objection as of sufficient weight to impede the expression of the House's opinion on the merits. If the House affirmed, there could be a remit to have the record amended; if reversed, that step was unnecessary.

May 28, 1827. sepite all existing claims and counterclaims, whatever might have been their origin or nature. That is evident from the covenanting part of the discharge. The preamble, thrown in as a sort of flourish in a deed not drawn by a law practitioner, cannot thwart or control the clear and explicit language which follows. Besides, truly, the appellant's father was enabled to give the loan from American money belonging to his partners, coming into his hands. At all events, this was a disputed claim, as interest had been refused on the bond from 1807. The conduct of M'Cormick proves this. If he thought he had a claim, he never would have qualified his receipt, or continued to receive qualified payments, without having made the matter a subject of expostulation or explanation. But he died without ever having used an explanation to the appellant, betraying the belief that this bond was not, like all other claims, utterly extinguished. The appellant, not suspecting that the narrow interpretation adopted by the Court below, could be ever sanctioned, refrained from making many claims, which were much better founded than the claim on the bond. Besides, quomodo constat, that the bond was not American? The appellant could prove by witnesses, that the bond was intended to be included in the discharge.

Respondents.—The parties to the discharge had not in view the bond of 1786. That was altogether a private loan, which was not, and could not, be disputed. The object of the agreement was to wind up the complicated claims arising out of the three different American firms, in which all of these parties had been mutually engaged. The preamble to the deed clearly indicates the intention and object of the discharge; and any general words that follow, must be construed consistently with that expressed intention. The true meaning of a deed is always to be gathered not from detached words, but a general view of the whole contents. There was nothing in M'Cormick's conduct that indicated an opposite belief. Accordingly, the *only* bond embraced in the claim of Mr M'Cormick, or brought into discussion before the arbiter, was that of 1782, which was a company transaction, and consequently American. But as M'Cormick's claim did not embrace the 1786 bond, this clearly shows what was actum et tractatum among the parties who signed the discharge. The receipt and state he gave Stewart proves that he considered the bond an existing debt; and the notandum related not to any doubt as to the validity of the claim, but to the correctness of the whole state. The entry in his pri-

vate books shows his opinion on the same point. Parole evi- May 23, 1827.
dence is inadmissible to control a written document.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with L.100 costs.

*Master of the Rolls.**—The material question here is, whether this bond was granted for a private or a partnership's debt. It is a private bond in form, and for a private debt. The party who says otherwise must prove his denial; for every instrument must be taken for what it imports to be. The trust bond of 1782 was given in trust expressly for partnership funds. If the second bond was for a partnership debt, the reasonable inference is, that it would have been given in the same shape. I am confirmed in my inference, by observing that the twelve accounts did not include the second bond. It is so stated by the respondent; and the importance of the point is too great to suppose that the appellant would not have made the correct statement, if the respondent had been inaccurate. Then come the accounts in the submission; they include the trust bond, but not the second bond. The appellant does not pretend that the second bond is to be found there. Now, if the second bond had been composed of equally partnership money as the trust bond, why did not the second bond enter into the consideration of the parties? The state and receipt given by M'Cormick to Stewart, was a demand on the private bond; and the note added was merely to say, 'If 'my calculation be not right, I shall correct it.' There is no evidence of this notandum having been added in consequence of any difficulty on the part of Stewart as to this second bond. If there had been a difficulty, it would have been explained to the appellant by his man of business. For these reasons, the inference I draw is, that it is not necessary for the respondents to prove that the bond was granted for a private debt. That is already proved; and as the terms of the discharge do not expressly include the private debt, I must hold that it is not discharged. My opinion is, therefore, that the interlocutors complained of ought to be affirmed.

Appellant's Authorities.—Ersk. Inst. 1. 1. 49.
Respondents' Authorities.—Ersk. Inst. 3. 3. 9.—Stair Inst. I. 18. 2. Erskine, July 30, 1714. (5029.)

FRASER,—ALEXANDER MUNDELL,—Solicitors.

* This opinion was communicated to the parties in a side-room.

No. 46.

JAMES WYLLIE, Appellant.

ELIZABETH ROSS and Others, Respondents.

Passive Title.—A testator having, by a deed of settlement, conveyed his property and effects to a party who was not the heir at law, under burden of payment of legacies, and the heir at law (who was the disponee's mother) having made up titles to the testator, and thereafter executed a gratuitous disposition in favour of the disponee, who, in the meantime, had intromitted with the funds of the testator: Held (affirming the judgment of the Court of Session) that he was liable in payment of the legacies, although he alleged that his right was derived from the heir at law, and not from the testator.

June 12, 1827.

2D DIVISION. Bill Chamber. Lord Eldin.

JAMES RITCHIE, who was proprietor of heritable subjects in the county of Perth, tenant of the farm of Cargill, and possessed of large personal funds, executed, in 1793, a deed of settlement, by which he disponed to his mother in life-rent, and to James Wyllie in fee, the lands of Hole of Scone and others; also two tenements of houses, and vacant ground, in Bridgend of Tay, and all heritable property of any kind that he should die possessed of, in the parish of Kinnoul; and assigned to Wyllie the tack of Cargill. By this deed it was provided and declared, 'that the said James Wyllie shall, by acceptation 'hereof, be bound, and the subjects before disponed are hereby 'expressly burdened with payment of the sum of L.200 sterling, 'to each of the children of David Ross, to bear interest from 'year and day after the decease of the longest liver, of the said 'Ritchie's mother and himself, and to be payable at the first 'term of Whitsunday or Martinmas, after the legatees have at-'tained the age of twenty years complete.' In like manner, James Ritchie disponed to his mother in liferent, and George Ritchie in fee, certain houses and lands in the parish of Scone, declaring that, by acceptation hereof, George shall be bound, and the subjects conveyed are burdened with the payment of certain legacies.

This deed did not contain procuratory or precept; but Ritchie bound and obliged himself, his heirs and successors, to infeft and seise his disponees in the fee of the respective subjects disponed to them, 'and for that purpose, to make and grant all 'deeds and writs necessary, containing procuratories of resig-'nation, precepts of seisin, and all other clauses necessary.' And further, he nominated Wyllie 'to be his sole executor and 'intromitter, with his whole goods,' &c. all which he bequeathed to him, under burden always of payment of his debts.

After the execution of this deed, James Ritchie entered into June 12, 1827.
an agreement with the Earl of Mansfield, for the purpose of exchanging the lands of Hole of Scone, for other lands called Airleywight. To determine what compensation should be paid by the one party to the other, a reference was made to an arbiter, who pronounced an award ordaining mutual conveyances, with a payment of L.2200, by his Lordship to Ritchie. The parties entered into possession, but no conveyance was executed during Ritchie's life. He also sold one of his houses at Bridgend of Tay, and all his other heritage, and he subset to one Duncan, at a surplus rent of L.80, the lease of the farm of Cargill.

Ritchie died in 1805, and his heir-at-law was his paternal aunt, Mrs Wyllie, the mother of the appellant, James Wyllie. The deed of settlement was immediately recorded; but Wyllie alleged, that as the subjects destined to him had been (with the exception of one of the houses at the Bridgend) conveyed to other parties, or sold; and the deeds and legacies of Ritchie amounted to more than the value of that house and his personal effects, he did not take up the succession under the deed. His mother, however, as the heir-at-law, expede a general service, and completed her titles, by infeftment under precepts of clare constat, to the properties which Ritchie had become bound to convey to Lord Mansfield. She then, in implement of the contract, disponed, with Wyllie's concurrence, these properties to his Lordship, and received from him a disposition to the lands of Airleywight. These lands she very shortly afterwards gratuitously disponed, under certain burdens, to Wyllie.

Wyllie's mother died in 1819, and thereafter the respondents, Elizabeth Ross and others, children of David Ross, raised an action before the Sheriff of Perthshire, against Wyllie, for payment of their respective legacies. Wyllie resisted the demand, on the ground, inter alia, that he had repudiated the deed, and held Airleywight not under Ritchie's settlement, but as disponee to the heir-at-law, who had made up titles as such. Elizabeth Ross and others replied, inter alia, that this was a mere device to defraud them of their legacies, and that Wyllie had taken under Ritchie's settlement, and been largely lucratus thereby. After a proof, from which it appeared that Wyllie had received payment of the surplus rents of the farm of Cargill from the sub-tenant, Duncan, and the value of certain meliorations from the landlord, the Sheriff found, 'that the defender did re-
'ceive from James Duncan, to whom the deceased, in his own
'lifetime, assigned or subset the said tack, additional rents pay-
'able by him for the same; and that, finally, he received from the

June 12, 1827. ‘ proprietor L.200, being the amount of the last year’s rent, sti-
‘ pulated to be received for ameliorations, which last year’s rent
‘ became due in the lifetime of the deceased’s mother, though
‘ the settlement of the said claim did not take place till 25th
‘ June thereafter,—Finds, that the foresaid deed of settlement is
‘ the only title that has appeared under which the defender was
‘ entitled to act; and being in the knowledge of that deed, he
‘ must be held to have accepted and acted under it,’ and there-
fore repelled the defences, and decerned against him.

He then presented a bill of advocation to the Court of Session, but the Lord Ordinary on the Bills refused it, and the Court, on the 12th November, 1825, adhered.*

Wyllie appealed.

Appellant.—The heir-at-law was not burdened with these legacies; and the appellant, as disponee in the lands, did not accept under the deed. There was nothing for the appellant to take up, the testator having, by the excambion with Lord Mansfield, conveyed away the lands intended for him. It matters not that feudal titles had not been interchanged. An effectual contract had been made, and parties were bound to implement it. No doubt, where a conveyance is made to the heir-at-law, burdened with legacies, he cannot shake off this burden by repudiating the settlement, and making up titles as heir-at-law. But here, the lands were not disponed to the heir-at-law, but to the appellant. He repudiated the settlement, and doing so, cannot be required to pay legacies, the payment of which were made to depend on his acceptance of the deed, and receiving the lands of Scone, but which lands had, previous to the testator’s death, been alienated. The appellant did not intromit with the testator’s succession, so as to incur a passive title.

Respondents.—The appellant has accepted of, and taken benefit from the deed of settlement, and intromitted with the testator’s estate and effects. The succession was valuable, and he could have no fair reason for repudiating it. It is a mere pretence to say that he did so, because he took the whole benefit which was to be derived from it, by receiving the rents and the value of the meliorations. It was necessary that his mother, the heir-at-law, should make up titles, because no procuratory of resignation, or precept of seisin, had been introduced into

* See 4 Shaw and Dunlop, No. 149.

the deed; and in order to give a feudal title to Lord Mansfield, she accordingly did so, and the appellant obtained possession of Airleywight, and the unpaid consideration money. It may be true, that this was accomplished through the intervention of his mother, but this was either with the view of carrying the deed into effect, or for the collusive purpose of attempting to defraud the respondents of their legacies. But even had the appellant rejected the succession, that would not have evacuated the legacies. For whoever took up the succession, did so under the burden of paying them; they being a burden on the succession. If the appellant's mother really took up the succession, she was liable; and he, as her gratuitous disponee, remains equally responsible. June 12, 1827.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.*

Appellant's Authorities.—3 Erak. Inst. 9. 10.—2. 2. 17.—3. 3. 48.—Lockhart, July 31, 1767 (6370).—3 Erak. Inst. 8. 82.
Respondents' Authorities.—3 Erak. Inst. 8. 51.

SPOTTISWOODE and ROBERTSON, *Solicitors.*

ROBERT LOW, Cashier of the Dundee Banking Company, Appellant.—*Keay—John Campbell.*
HENRY BELL, Trustee on the Sequestrated Estate of James Duncan, Respondent.—*Wetherell—Stuart.*

No. 47.

Bankrupt—Stat. 1696. *c.* 5.—A party having drawn two bills on another, and discounted them with a Bank, and the bills having been dishonoured by non-acceptance; and the drawer having, within sixty days of his bankruptcy, drawn a bill on his son for the amount of the dishonoured bills, which he accepted, on receiving an heritable security in relief; and this bill having been indorsed to the Bank by the drawer, and he having been sequestrated,—Held (affirming the judgment of the Court of Session,) That the indorsation to the Bank was reducible under the act 1696, c. 5, but reversing the judgment so far as it imported that the bill was to be delivered up by the Bank to the trustee for the creditors of the bankrupt.

IN June 1820, James Duncan, merchant in Dundee, drew two bills for L.300 each, which he discounted with the Dundee Bank. The bills were forwarded to the drawers for acceptance, but were dishonoured, and returned under protest to the June 12, 1827. 1ST DIVISION. Lords Meadowbank and Kinneder.

* The Lord Chief-Baron heard this appeal.

June 12, 1827. Bank. James Duncan being, from pecuniary embarrassments, unable to retire the bills, his eldest son, Patrick Duncan, on the 28th July 1826, accepted a bill, drawn by Alexander Duncan, per procuration of his father James, for L.615, and which Alexander indorsed (per procuration) to 'David Jobson, Esq. 'cashier of the Dundee Banking Company,' in satisfaction of the two dishonoured drafts, which were accordingly delivered up.

At the same time, James Duncan granted to his son Patrick an heritable bond in security, on which Patrick took infeftment.

On the 4th September 1820, James Duncan was sequestrated, and Miller, having been elected trustee, raised an action of reduction against the Bank, (in whose place Bell now stood,) on the statute 1696, c. 5, and subsuming that the bill for L.615 was indorsed to the Bank on behalf of the bankrupt, in security of a former debt, with the intention of giving the Bank a partial preference, and to defraud and disappoint the pursuer and the other just and lawful creditors, and at a time when the drawer was in insolvent and bankrupt circumstances, and within 60 days of his sequestration; and therefore concluding, 'that the foresaid 'bill, with all that has followed or is competent to follow there-'on, ought and should be reduced, retreated, rescinded, cassed, 'annulled, decerned, and declared, by decree of our said Lords, 'to have been from the beginning, to be now and in all time 'coming, null and void, and of no avail, force, strength, or 'effect in judgment, or outwith the same, in all time coming, 'and the pursuer reponed and restored thereagainst in inte-'grum, and the said bill delivered up to the pursuer, as trustee 'foresaid.'* The Lord Ordinary (Meadowbank) sustained the reasons of reduction, and reduced, decerned, and declared conform to the conclusions of reduction and other conclusions libelled, with expenses. The Bank now limited its claim under the renewed bill to the precise sum which would have been due under the old bills. Thereafter the Lord Ordinary (Kinneder) found, 'that on the 28th July 1820, the date of the bill 'challenged, the Dundee Banking Company were creditors of 'James Duncan, the bankrupt, for two bills of L.300, each pay-'able at subsequent periods, which had been discounted by the 'Company; that the bill under reduction having been drawn 'by Alexander Duncan, per procuration of his father, the bank-

* The pursuer also challenged James' authority to Alexander, in respect of James' state of health at the time. But this ground of reduction was not at present insisted on.

'rupt, was accepted by his brother, Patrick Duncan, who had June 12, 1827.
'previously obtained from his father an heritable bond and dis-
'position in security for the sum of L.600, and that this bill,
'payable at a distant date, was delivered to the Dundee Banking
'Company in lieu of the two bills above mentioned, of which
'the terms of payment had not then arrived; that this bill was
'a deed in favour of the said Company, for their further securi-
'ty, in preference to the other creditors of the said James
'Duncan; and therefore adhered.' The Court, on the 19th November, 1822, on advising petition and answers, adhered, 'reserving the effect of the acceptance of the bill for L.615 by 'Patrick Duncan, the son of the bankrupt, in so far as the pe-
'titioners may operate thereon against the said acceptors; and
'also reserving to the petitioners to rank upon the sum of L.600
'of the original debt against the bankrupt; and reserving to the
'respondents all objections, as accords.'

The Bank reclaimed, praying the Court to find, 'that the 'bill challenged is not to be delivered up;' and the trustee reclaimed, (he having also instituted an action of reduction against Patrick Duncan of the heritable security,) praying for a simple adherence to the Ordinary's interlocutor. The Court, on the 11th December 1822, refused the prayer of both as unnecessary.*

The Bank then raised an action, in name of Low, their cashier, who had succeeded Jobson, before the Sheriff, against Patrick Duncan, founding on his acceptance, and concluding for payment of the amount. The Sheriff decerned in terms of the libel; but the Court of Session altered, and found, that as, by their interlocutor, they had cut down all right and title which the Bank could have to that bill, the indorsation could no longer be made the ground of action against the acceptor.†

Thereupon the Dundee Banking Company appealed against the judgments in the action at the instance of Duncan's trustee against them.

Appellants.—Patrick Duncan was not debtor to the bankrupt estate; an indorsation of his bill, therefore, cannot injure that estate. Patrick is solvent. Besides, the bill took the place of other bills, against which no objection existed, and on which there was parata executio. There is no accumulation of inte-

* 2 Shaw and Dunlop, No. 74. † See next case.

June 12, 1827. rest or expenses, and the bankrupt estate was liable under equally liquid documents of debt for the full amount of the second bill, as restricted. The title of the trustee to reduce is therefore discharged, for the estate suffered no prejudice. It appears that Patrick had taken an heritable bond from the bankrupt, but the Dundee Banking Company was ignorant of that transaction. They stand exactly as if no such bond had been granted. Even this bond bears date several days before the bill; and it is against all feudal principle that an heritable security should cover advances subsequently made. The Bank received the bill optima fide, in the ordinary course of business, and as full value for the original drafts. The statute 1696, c. 5. does not apply. The payment here was equivalent to cash, or to a payment in the course of trade; and, besides, the granting of the second bill was not voluntary.

Chief Baron.—Does it appear that any diligence was used on this bill?

Campbell.—We do not understand so. Execution on bills is, however, summary, and there was parata executio. Neither was any preference created by the last bill; no creditor was prejudiced. The contents of the bill would not otherwise have been divided among the other creditors on the estate. The bill neither increased the amount of debt against the estate, nor saved the appellants any process of law for the recovery of the amount due them.

Chief Baron.—Have we before us the question as to the heritable bond, except in so far as it may be used in argument?

Campbell.—No, my Lord, the House has not.

Respondent.—A bill was drawn (by Alexander per procuration of James) on 18th July, 1810, the date of the bond, but the Bank conceiving the procuration not to have been regular, another bill (the one in question) was drawn on the 28th of the same month; the bond, therefore, was not in security of a future advance. The respondent raised an action of reduction of the bond against Patrick, and succeeded, and the question has not been appealed. The bill itself has also been reduced, and on insuperable grounds. The transaction falls within the statute 1696, c. 5; the indorsation was an assignation made within 60 days before bankruptcy in favour of one creditor, for the purpose of his payment or further security, in preference to the other creditors; and, being so, is cut down by the statute. To prevail, the appellant must show that his case is an exception to the general rule. But in this he has failed. It is in vain to

describe this as a payment in the course of trade; and it is June 12, 1827.
equally obvious that Patrick Duncan was interposed, to enable the Bank to accomplish indirectly what could not be attained directly. The heritable security cannot be separated from the bill. It enabled the Bank to obtain payment. If the Bank had been permitted to exact payment from Patrick, then he would have raised money on the security, or sold the lands over which the security extended, and thus have diminished, to that extent, the bankrupt estate, at the expense of the other creditors. The only consideration given by Patrick for the bond was his acceptance, which, if reduced, he does not pretend that the security could be further available to him. It is impossible to conceive, from the circumstances of the case, that the Bank was ignorant that the bond had been required and granted.

The House of Lords ordered and adjudged, 'that the interlocutors complained of in the said appeal, so far as they may have the effect of directing the bill of exchange for L.615, accepted by Patrick Duncan, to be delivered up by the appellant, the cashier of the Dundee Banking Company, to the trustee of the sequestrated estate of James Duncan, be, and the same are hereby reversed; and it is further ordered, that the said interlocutors in all other respects be, and the same are hereby affirmed.'

Appellant's Authorities.—2 Bell's Com. (and cases there referred to) 220 et seq.—19 Geo. II. c. 32. § 1.—Hawkins *v.* Penfold.—2 Vesey, 550.
Respondent's Authorities.—2 Bell's Com. (and cases there referred to) 220 et seq.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON—Solicitors.

ROBERT LOW, Cashier of the Dundee Banking Company, Appellant.—*Keay—John Campbell.*
PATRICK DUNCAN, Respondent.—*Adam.*

No. 48.

Title to Pursue.—A party having accepted a bill for the accommodation of the drawer, from whom he received an heritable security in relief; and the bill having been indorsed to the cashier of a Bank in payment of a debt due by the drawer; and the indorsation having been reduced at the instance of the trustee for the creditors of the drawer on the act 1696, c. 5, reserving the rights of the Bank against the acceptor; and the cashier of the Bank having brought an action on the bill against the acceptor before an Inferior Court, which was advocated ob contingentiam of a reduction of the heritable security; and the Court of Session having sustained the

reasons of advocation, and found that the Bank had no right to sue on the bill; and the heritable security having been reduced, Held, (affirming the judgment, so far as it sustained the reasons of advocation, but reversing it so far as it found that the Bank could not sue on the bill,) That as there was no evidence that the Bank was participant in the granting to the acceptor of the heritable security, they, and their cashier for their use, were entitled to maintain an action, for payment of the bill, against the acceptor.

June 12, 1827.

1st DIVISION. Lords Eldin and Meadowbank.

THE circumstances which gave rise to the present question, will be found in the preceding case. Miller, the trustee for James Duncan, having raised an action against Patrick Duncan, for the purpose of reducing the bond and security granted to Patrick by James, within sixty days of bankruptcy, obtained decree to that effect. The trustee had previously got a decree of reduction, in terms of his libel against the Dundee Banking Company, reducing the bill drawn by James on and accepted by Patrick, and which had been specially indorsed to the then cashier of the Bank; but with the reservation 'of the effect of 'the bill, in so far as the Bank may operate thereon against 'the said accepter.'

In virtue of this reservation, Low, now cashier of the Dundee Banking Company, raised an action before the Sheriff of Forfarshire against Patrick Duncan, founding on his acceptance, and concluding for payment of the amount. Patrick, in defence, stated, that the indorsation which the Bank had held to the bill, was completely destroyed by the trustee's decree of reduction; and that if they had any claim, it could only be for damages, on which he was ready to meet them; but that as the present action was laid on the bill alone, he was entitled to be assoilzied. The Sheriff found, 'that by the final interlo-'cutor of the Supreme Court, pronounced in the action of re-'duction at Mr Miller's instance against the pursuer, regarding 'the bill in question, the effect of that bill is reserved to the 'pursuer, in so far as he may operate thereon against the defen-'der, Patrick Duncan, acceptor of the bill. Therefore, that the 'pursuer has still right to insist for payment of said bill from 'the defender, Mr Duncan;' and repelled the defences. In the meanwhile, the trustee on James Duncan's estate had brought the reduction of the heritable security granted to Patrick; and in consequence of a note issued by Lord Eldin, suggesting that both cases should be decided by the same judicatory, Patrick brought an advocation ob contingentiam, which having been remitted to the reduction, Lord Eldin repelled the reasons of advocation, remitted the case simpliciter to the Sheriff, and decerned. The question then came by representation before

Lord Medwyn, who took the case to report, observing—'(in a note to a similar order in the process Miller v. Patrick Duncan)—that he could 'not concur in the interlocutor last pronounced in these cases. He does not understand how the 'Dundee Bank can bring an action against the acceptor of the 'bill for L.615, when the indorsation in their favour stands reduced, and the bill ordained to be delivered up to Duncan's 'trustee, the pursuer of the reduction. Farther, the Lord Ordinary thinks, that if the defender is to be called upon to pay 'this bill, and thus relieve the bankrupt estate of the debt due 'to the Bank, he ought not, in a question with the trustee, to 'be deprived of the heritable security, which was the condition 'on which alone he agreed to become bound to interpose his 'credit, and make the payment. On the other hand, if the disposition in security is to be set aside, it appears equitable, and 'according to the view indicated in Lord Mackenzie's interlocutor, (5th March 1823)*, that Duncan's trustee should hand 'over to the defender the bill which, in his action against the 'Dundee Bank, is ordered to be delivered up to him, so that 'there should be a restitutio in integrum. Besides, the parties differ about the meaning and effect of the reservation 'thrown into the interlocutor of the Court. The Dundee Bank 'allege that it was held, although the indorsation was reduced, 'that this was only against the drawer, but not against the acceptor, which does not appear to be very likely, as that would 'be giving a very anomalous effect to an indorsation of a bill; 'nor is it very consistent with the farther reservation, to rank 'on the original debt, which the Dundee Bank could have no 'pretence for doing, if they recovered payment of the bill, which 'came in place of it, from the defender. It appears probable, 'that the reservation was introduced in case the Dundee Bank 'could qualify any damage, in consequence of the defender having interposed with the security, which has proved ineffectual, and which, perhaps, might have prevented the Bank from 'recovering payment at the time by more vigorous proceedings 'against the original debtor. At all events, the Court are the proper interpreters of the reservation in their own interlocutors.' Informations having been accordingly prepared and advised, the Court, on the 8th December 1825, sustained the reasons of advocation, advocated the cause, and found 'that the Dundee 'Banking Company, and Robert Low their cashier, can main-

June 12, 1827.

* Pronounced in the action of reduction, Miller v. Duncan. The Court, 9th Dec. 1826, reduced. This judgment was not appealed.

June 12, 1827. 'tain no action against Patrick Duncan upon the bill libelled, 'and decerned, with expenses.'*

Patrick Duncan appealed.

Appellant.—The appellant has a title to pursue. The respondent's acceptance of the bill was part of an onerous contract with the Bank, who surrendered the old drafts on receiving Patrick's acceptance, thereby giving full value for it. Patrick's liability cannot be affected by the circumstance of the indorsation to them by James being reduced. That was, as to Patrick, res inter alios judicata. The document stands in full force as to third parties; and must bind Patrick, who neither denies that the debt was contracted, nor that it is still due. But independent of the plea in law, the appellant's right of action is effectually preserved by the reservation in the interlocutor of the 19th November 1822. Under this interlocutor, the respondent found that he could not force delivery of the bill; which shows its force and meaning. The respondent cannot plead res inter alios, on the ground that he was not a party to the action in which the reservation was made,—for he rests on the reduction, which unquestionably was to him res inter alios, and he cannot be permitted to entertain contradictory pleas. Neither can the explanation stand, that the reservation was intended merely to save the Bank's claim of damages; that is not supported by the words of the reservation. And even if otherwise,—and if the appellant has suffered damage,—it is from being refused action on the bill. But that would import, that the Court felt they were doing the appellant an injury, and therefore they reserved the means of redress,—an untenable supposition. The respondent does not pretend that the Bank was aware of the heritable bond.

Respondent.—The appellant has no title to pursue. The action is raised in his name, as cashier of the Dundee Banking Company, for behoof of that Company. But that Company is not incorporated either by statute or royal charter. Besides, the bill on which the action is raised, is indorsed not to the appellant, but to the former cashier.

On the merits: The indorsation has been reduced and set aside by the final decree of the Bank. The objection, that that action is res inter alios, is of no weight. The respondent has

* 4 Shaw and Dunlop, No. 209.

a legal interest to plead the nullity of his opponent's title, though June 12, 1827.
that nullity was declared in an action to which the respondent was not a party. The respondent is owing no debt to his father's estate. The value given for his acceptance, was the bond and security; and that being cut down, the debt in the acceptance falls also. The object of the reservation was solely to enable the Bank to raise action against the respondent, or any other medium concludendi,—nor can another meaning be maintained, consistent with the conclusion of the summons, and the interlocutors which followed, decerning conform to these conclusions. The bill ought to have been delivered up, and at this moment the Bank are truly wrongful possessors of it. Even although the indorsation had not been reduced, the Bank could not have enforced payment against the respondent; for as far as the Bank was concerned, the transaction was illegal. Neither would the Bank be benefitted in this action, if a reversal ensued in the case against the Bank. If the Bank considered, that thereby there opened a claim against the respondent, the question must be tried in a new action,—for the present action rests on the assumption, that in October 1823, the Bank had an undoubted right to the bill, but which is not the fact; for at that very moment, the bill stood reduced by a decree then final and unappealed.

The House of Lords found, that 'for as much as it does 'not appear, either by admission or evidence, that the cashier 'of the Dundee Banking Company, or any other person au- 'thorized on their behalf, did concert with James Duncan 'or the said Patrick Duncan that the said James Duncan 'should give to the said Patrick Duncan the heritable secu- 'rity mentioned in the proceedings, in consideration of his 'the said Patrick Duncan's accepting the bill of exchange for 'six hundred and fifteen pounds in question: It is therefore 'ordered and adjudged, by the Lords Spiritual and Temporal 'in Parliament assembled, That the interlocutor of the 8th De- 'cember 1825, complained of in the said appeal, in so far as it 'sustains the reasons of advocation, be, and the same is hereby 'affirmed; but that the same, and the several other interlocu- 'tors complained of, be, and the same are hereby in all other re- 'spects reversed; and it is declared, that the Dundee Banking 'Company, and Robert Low, their cashier, for their use, as the 'holders of the said bill, can, in the circumstances beforemen- 'tioned, maintain an action against the said Patrick Duncan 'as acceptor of the said bill: And it is further declared, that

June 12, 1827. 'the said cashier and the said Banking Company are entitled 'to their expenses in the Court below: And it is further or- 'dered, that the cause be remitted back to the Court of Session 'in Scotland, to proceed according to the aforesaid declarations, 'as shall be just.*

Appellant's Authorities.—Dictionary of Decisions, ("Res inter alios.") Bell's Com. 2d vol. p. 407; 3d edition.
Respondent's Authorities.—Bell, vol. 1, p. 232.

RICHARDSON AND CONNELL,—ALEX. MUNDELL, Solicitors.

No. 49.

BUDGE and Co. and Others, Appellants.—

MAGISTRATES OF EDINBURGH, Respondents.—

Statute 25 *Geo. III. c.* 28.—Found, (affirming the judgment of the Court of Session,) that, under this statute, the Magistrates of Edinburgh have right to levy impost-duty from all vintners and tavern keepers within their bounds, on all foreign wines and other liquors specified in the act, consumed within the taverns, whether the vintners themselves imported those liquors, or purchased them from other importers who had not paid the duty; but that if the Magistrates so levy the duty, they cannot assess the tavern keepers in the commutation tax, in respect of the taverns where the liquors are sold and consumed.

June 13, 1827. 2D DIVISION. Lord Mackenzie.

By royal grant, dated 1st April 1671, the Magistrates of Edinburgh were authorized to levy a certain impost on every pint of certain wines, and other liquors, 'importando et ven- 'dendo infra dictam civitatem de Edinburgh,'—'solvendum 'per venditores et cunctos alios inuectores dictos.' This grant was ratified by Parliament, 11th September 1672. In 1785, the statute 25 Geo. III., c. 28, was passed, by which it was enacted, (§ 59,) that all grants and ratifications in Parliament, in favour of the city of Edinburgh, 'for payment of the impost or 'duties on French, Rhenish, brandy wines, &c. shall subsist in 'force and effect, respecting all vintners, keepers of taverns or 'inns, and all others who keep public houses, shops, cellars, or 'other places, wherein these liquors, or any of them, are or shall 'be consumed by drinking, and sold for the purpose of their being 'consumed by drinkers; and that the Magistrates of Edinburgh 'shall have full power and authority to continue to collect and

* This appeal was heard by the Lord Chief Baron.

'levy the same, from all and every person of the before men- June 13, 1827.
'tioned description, living and residing within the said city of
'Edinburgh.' It also declared that the imposts 'shall be abo-
'lished, and discharged to be levied and collected, so far as re-
'spects every private family, and all others who do not fall un-
'der the description of vintners, and others herein before men-
'tioned. And it is hereby declared, that grocers, and others
'retailing such liquors, do not fall within the said description,
'unless the said liquors shall be sold and drunk in their shops,
'houses, warehouses, or offices;' and in place thereof (§ 62) it
was provided, 'that, whereas the revenue of the city of Edin-
'burgh will be diminished by the aforesaid abolition of the im-
'post on wines, foreign spirits, and foreign ale and beer con-
'sumed in private families, be it enacted by the authority fore-
'said, that at the said term of Martinmas next, the city of
'Edinburgh, and the Lord Provost, Magistrates, and Town
'Council thereof, and their successors, for themselves, and on
'behalf of the community thereof, in aid of the common good
'and patrimony of the burgh, shall have full power and authority
'to assess, tax, levy, and collect, from all and sundry the inhabi-
'tants of the ancient royalty of the city of Edinburgh, and the
'inhabitants of the new town of the extended royalty, who at
'present are, or might have been subjected to the aforesaid im-
'post, the sum of one pound per cent of the valued rent of their
'houses and possessions, and that yearly and each year.'

Founding on these grants and acts of Parliament, the Magistrates raised an action of declarator against Budge and Co., and other tavern-keepers and vintners in the city, concluding that it should be declared, 'that they, in virtue of the grants
'recited, and of the exercise of the rights of levying impost
'duties, and other duties following thereon as aforesaid, have
'an undoubted right and title to collect and levy from all vint-
'ners, &c. the impost or duties before specified, on all the li-
'quors mentioned in the statute, which are and shall be sold in
'their houses, and that without regard to the circumstance
'whether they themselves shall have imported those liquors, or
'purchased them from others who may have imported the same;
'and also, it should be found and declared, that the pursuers
'have likewise a right and title to assess, tax, levy, and collect,
'as a commutation on the impost of wines, foreign spirits, fo-
'reign ale and beer, consumed in private families, from the said
'David Budge, &c. the sum of one pound per cent of the valued
'rent of their houses and possessions, and that yearly and each
'year.'

June 13, 1827. In defence it was maintained, that although the defenders were liable for wines imported by themselves, yet, in regard to wines purchased from wine merchants or other importers, they were not liable. And that they were specially exempted from the commutation tax.

The Lord Ordinary found,* 'that the pursuers, in virtue of 'the grants and acts of Parliament libelled, have right to levy, 'from vintners, keepers of taverns, inns, public houses, shops, 'or cellars, within the limits libelled, or other places where 'French, Spanish, Rhenish, or brandy wines, or the other fo- 'reign liquors libelled, or any of them, are consumed by drink- 'ing, or sold for the purpose of being there consumed by drink- 'ers, the impost duty libelled on all such liquor as is so con- 'sumed, or sold for the purpose of being consumed in these 'houses or places of sale, and that without regard to the cir- 'cumstance, whether the defenders themselves shall have im- 'ported these liquors, or purchased them from others who may 'have imported the same, unless the said impost duty shall 'have previously been paid upon the said liquors; in which 'case, finds, that the pursuers can have no farther claim for any 'duty on account of the same, and decerns and declares accord- 'ingly, as against these defenders, and ordains them to desist 'and cease from troubling and molesting the pursuers and their 'successors in office, in the exercise of their rights so found and 'declared in all time coming. But finds, that the pursuers have 'not right to levy the commutation duty libelled, in respect of 'the taverns, inns, hotels, shops, cellars, or other places where 'the said liquors are sold and consumed, in such manner as to 'be liable in impost duty; and finds it not alleged that the de- 'fenders have any other houses within town, and therefore as- 'soilzies the defenders from the conclusions of the libel respect- 'ing the said commutation tax, and decerns, and found neither 'party entitled to expenses. Note, The Lord Ordinary con- 'siders the case of Burns v. Hay, as affording much light in 'this question. He thinks that, prior to the act 25 Geo. III. 'c. 28, the magistrates might certainly have levied from vint- 'ners the impost on account of liquor of the kinds libelled, 'which was knowingly sold by them for consumption in their 'taverns, without having previously paid duty, as in cases of 'smuggled liquor, or liquors imported by a member of the Col-

* The Lord Ordinary found the action 'incompetent, in respect to the defenders not named in the summons;' but this point was not appealed.

'lege of Justice, or under a special warrant of exception, and June 13, 1827.
'yet sold to a vintner, (which might happen fairly from neces-
'sity, as under legal diligence, &c.) and if this was law before
'the statute, the Lord Ordinary thinks it remains law now;
'the statute giving no exception to vintners, &c. in respect to
'liquor sold by them for consumption in their taverns. The
'Court went further in Burns' case, where they found that li-
'quor must pay impost on being sent to the cellar of the vint-
'ner, &c. from that of the merchant. If that be law, a fortiori,
'the magistrates may make their present claim for impost on
'liquor actually used by the vintners. The Lord Ordinary does
'not consider the argument of the defenders to be sound, that
'the liquor has already paid duty when it is imported by a wine
'merchant, who pays the commutation tax for his own house.
'The Lord Ordinary has no conception that a wine merchant
'pays the tax on his individual house, as commutation for im-
'post on all the wine he imports. He thinks that this tax is
'now paid generally by the inhabitants, in commutation for the
'impost formerly payable by the inhabitants generally. But he
'thinks this tax is not payable at all by anybody in commuta-
'tion for the impost tax payable by vintners, &c. which indeed is
'really and ultimately paid by their customers, who are not al-
'ways, or perhaps chiefly, inhabitants at all. This view it is
'that induces the Lord Ordinary to think it must be unjust to
'charge the commutation tax on the taverns, &c. because that
'would be just in substance subjecting the guests or customers
'of the vintners to both taxes at once, *i. e.* to a tax on the
'wine, and yet also to a commutation tax on the tavern. If the
'vintners had distinct houses for their own residence, a different
'question might arise as to the commutation tax on these. But
'this is probably of little moment.' And the Court, on the 3d March, 1826, adhered.*

Budge and Co. appealed.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L.100 costs.†

---

* See 4 Shaw and Dunlop, No. 340.

† The Master of the Rolls heard this appeal.

No. 50. ALEXANDER RANALDSON M'DONELL of Glengarry, Appellant.—*Shadwell—Keay.*
WILLIAM CAMERON and Others, Respondents.—*Brougham—Stuart.*

Landlord and Tenant.—Circumstances in which it was held (affirming the judgment of the Court of Session) That a tenant of a sheep farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed.

June 13, 1827. 1ST DIVISION. Lord Meadowbank.

CAMERON, an extensive sheep-farmer in the Highlands of Scotland, was tacksman of the lands of Inverguseran, part of the estate of M'Donell of Glengarry, and of Torrery, part of Scotos, belonging to Grant of Glenmorriston. Torrery was situated in the heart of the lands of Inverguseran, and was made use of for pasturing the sheep in winter, being in a more sheltered position than Inverguseran. In 1809, Cameron took a renewed lease of Inverguseran, and of a wintering farm called Aultfern. On the part of Glengarry, it was stated, that at this time he contemplated purchasing Scotos, and was desirous that Cameron should not take a lease of Torrery from Mr Grant. In 1814, and in reference to a proposal by Cameron, for a renewal of his lease of Inverguseran and Aultfern, Glengarry agreed to give a renewal, 'under the express stipulation of having no-'thing to do with Torrery, while it continues the property of 'any other landlord.' The reason of this stipulation was the intention which Glengarry still entertained of purchasing the lands of Scotos. In 1818, Glengarry granted to Cameron a new lease for twelve years of Inverguseran and Aultfern, 'Tor-'rery excepted, under the express stipulation of my last letter.' By Cameron, it was stated, that the agreement between them was, that in the event of Glengarry purchasing Scotos, then Cameron was to give up the wintering farm Aultfern, and receive in place of it Torrery.

In 1819, Glengarry bought Scotos; at which time Torrery was under lease to another tenant till 1820. Glengarry thereupon raised an action of removing from Aultfern against Cameron, in which he obtained decree in absence. Cameron then suspended, on the ground that it had been agreed that if he removed from Aultfern, he was to have right to Torrery. Cameron, however, alleging that he was assured by a third party, authorized by Glengarry, that if he dropped the suspension, he would get Torrery at Whitsunday 1820, removed from Ault-

fern, ceded possession to Glengarry, and named a valuator (as had been agreed by lease) to fix the allowance of deduction of rent. A great deal of correspondence then took place on the subject; but on the removal of the tenant from Torrery, Glengarry let it for seven years, with a break at the end of two, to one M'Kinnon. In July 1821, Cameron took a subset of Torrery from M'Kinnon, which he said he found indispensable for his sheep. Glengarry, availing himself of the break, brought an action against M'Kinnon to remove from Torrery, and against Cameron, to remove from Inverguseran and Torrery. The sheriff pronounced decree of removing against M'Kinnon, ascoilzied Cameron as to Inverguseran, but found that he had shown no title to continue in possession of Torrery, and decerned in that removing. June 13, 1827.

Cameron then advocated, and also raised a relative action of declarator, concluding that he was entitled to the possession of Torrery during the currency of the lease of Inverguseran, at such rent as might be fixed by men mutually chosen; and should he not succeed in having his right to Torrery enforced, then that the decreet in absence of removing from Aultfern should be reduced, and possession ceded to him. The process of advocation having been remitted to the declarator, and Cameron having died, and the action having been transferred against his representatives, the Lord Ordinary ascoilzied Glengarry from the declarator, and remitted the advocation simpliciter to the Sheriff. Cameron's representatives then reclaimed, and the Court advocated and conjoined, and in both processes altered, ascoilzied from the action of removing, found 'that the petitioner's 'author, Alexander Cameron, having removed from the lands 'of Aultfern, is entitled to the possession of the lands of Tor-'rery during the subsistence of his lease, at an adequate rent;' appointed mutual condescendences on the relative values of Aultfern and Torrery, as proper pendicles of the farm of Inverguseran; and found Glengarry liable in expenses; and thereafter the Court, on advising a petition for Glengarry on the 18th January 1825, adhered.*

Glengarry appealed.

Appellant.—M'Kinnon had no right to assign or subset Torrery. Even if he had, Cameron's right of subset expired at the

* 3 Shaw and Dunlop, No. 245.

June 13, 1827. break, in favour of Glengarry, and he was bound to remove. He cannot be permitted, having got in as subtenant, to continue possession on another pretended title. The case is the same as if Cameron had entered brevi manu, and attempted to remain on some imagined legal title. But if he had a title, that must undergo discussion in a competent Court, and, ante omnia, Glengarry must be restored to possession. There is no evidence that Glengarry bound himself to give Torrery on Cameron ceding Aultfern. On the contrary, the evidence is the other way, and is corroborated by the conduct of Cameron himself.

Respondents.—It is quite evident that Torrery was only excepted while the property of another landlord—upon being acquired, then it entered the lease; and that such was the intention and arrangement of parties, is plain from the ceding of Aultfern. This is proved by the whole facts and written evidence in the case. In point of fact, Inverguseran was rendered useless without a wintering farm, which both Aultfern and Torrery were. Even had the written evidence been imperfect, the respondents were, in the circumstances of the present case, entitled to resort to parole testimony; but the Court of Session were satisfied with the evidence before it. Cameron was constrained to enter into the arrangement with M'Kinnon, otherwise Cameron's stock would have perished from want of wintering. He entered on a legal title; and the agreement as to the exchange of Torrery for Aultfern, barred Glengarry from challenging that possession.

Master of the Rolls.—There is a difficulty here—whether, not having a better legal title, but a better equitable title than Glengarry, could Cameron enter into possession against the will of the owner?—If Cameron had a title to enter without the consent of the owner, then he might have continued possession. But suppose Torrery had been vacant, could Cameron, without Glengarry's consent, have entered and retained possession against Glengarry's ejectment?—Would his admission that it had been agreed that the farms were to be exchanged, have afforded a good defence to this action of removing?—Cameron's antecedent title was not complete—the proposed valuation had not been made—the rent was not settled—no valuation could be made by Glengarry; he had in view to purchase Scotos, but could not tell the seller that. Now, could Cameron have claimed Torrery until the rent was fixed?

Stuart.—I think he could; and was entitled to resist Glengarry's ejectment. Cameron could have proceeded with the valuation, although Glengarry might not. It being admitted that there was an agreement for exchange, Cameron, having entered, would be protected in the possession by the agreement. The condition had become purified, and the event had happened which entitled him to Torrery. June 13, 1827.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with L.150 costs.*

Appellant's Authorities.—Ersk. Inst. 4. 1. 15.
Respondents' Authorities.—M'Rory, 18th December, 1810. (F. C.) Murdoch, 18th June, 1812. (F. C.)

FRASER,—M'DOUGALL and CALLENDER,—*Solicitors.*

ALEXANDER RANALDSON M'DONELL of Glengarry, Appellant.—*Shadwell—Keay.*
WILLIAM CAMERON and OTHERS, Respondents.—*Brougham—Stuart.*

No. 51.

Landlord and Tenant—Process—Advocation.—A landlord having raised a process of sequestration against a tenant, and the Sheriff having found a certain sum of rent due, for which he decerned, and another for which, if not paid, warrant of sale would be issued; but no final judgment having been pronounced, and the tenant having brought a process of advocation ob contingentiam of a declarator which he had raised but not executed; and the Court of Session having advocated the cause, 'sustained the reasons of advocation, and assoilzied from the conclusions of the process;' and the landlord having contended in the House of Lords, that, as the only 'reason of advocation' was the alleged contingency with the declarator, and as no such action had then been in Court, the advocation ought to be dismissed:—The House of Lords affirmed the judgment of the Court of Session, in so far as it advocated the cause, sustained the reasons of advocation, and assoilzied from the conclusions of the process; but remitted, with instructions to remit to the Sheriff, to proceed in terms of his interlocutor.

---

* The Master of the Rolls gave his reasons for the judgment in a side room; and the reporters understand that his Lordship would have had much difficulty as to the title on which Cameron got into possession, being a good defence to a removing, if the advocation had not been conjoined with the declarator.

June 13, 1827.

1st Division. Lord Meadowbank.

THIS case arose out of the circumstances of the previous one. In January 1822, Glengarry presented to the Sheriff of Inverness-shire a petition, stating, that his tenant, Alexander Cameron, tacksman of Inverguseran, and others, was indebted to him in the sum of L.180, 9s., the balance of the half-year's rent of these lands, payable at Martinmas 1821; that Cameron would be due at Whitsunday 1822 L.285,—being the succeeding moiety of the rent; also L.5 road-money; L.6, 3s. 10d. fox-hunter's dues for the same year;—that M'Kinnon and Cameron were jointly and severally indebted the sum of L.30, being the half-year's rent of Torrery, payable at Martinmas 1821; and would be due the like sum at Whitsunday 1822, as the succeeding moiety of rent,—and praying for sequestration, but reserving to Cameron all claims competent to him for the lands of Aultfern, ceded at Whitsunday 1819, at a rent to be fixed by persons mutually chosen. In terms of the prayer, sequestration was awarded and executed on 2d February 1822.

The Sheriff, on the 18th May 1822, found the rent of Inverguseran and others, to be L.560 yearly;—that Cameron, having occupied Torrery, as sub-tenant of M'Kinnon, was liable in the same rent as M'Kinnon;—that the rent of Aultfern must be L.30 yearly, (agreeably to a report by a valuator, to whom the Sheriff had remitted that point);—that a retired *draft by* Cameron for L.200, and two receipts granted by Glengarry's factor on 16th November, and 8th December 1821, for L.281, must be imputed in extinction pro tanto of the half-year's rent due at Martinmas 1821; and that the half-year's rent for Aultfern, due at the same term, must be imputed in the same manner; and on Cameron consigning L.300, subject to the future orders of the Court, to meet the half-year's rent due at Whitsunday 1822, when the exact amount thereof should be ascertained, recalled the sequestration. Both parties were dissatisfied with this judgment—Cameron, because the valuator's report had been adopted, and that expenses had not been awarded to him, and because it was not declared that Torrery was given in exchange for Aultfern, and the rent fixed for the former by a valuation of both;—Glengarry, because the rent was struck at L.560, instead of L.570, and because the sums in the agreement, and paid to his factor, had been imputed to the 1821 rent, and not to previous rents, alleged to be yet unsettled. Thereafter the Sheriff, on the 11th October 1822, pronounced this judgment:—'Sustains the claim for the road assessments, amounting to L.5; Finds, that the agreement among the Knoidart tenants for the fox-hunter's dues, does not apply to this ques-

'tion, and besides, bears no date; and as the defender, Mr Ca- June 13, 1827.
'meron, avers that he paid the fox-hunter's dues for the year
'mentioned in the petition, and as no evidence is produced or
'offered to the contrary, or that the fox-hunters were paid by
'Glengarry, rejects this article of charge: Finds, that upon the
'principles of this and the former interlocutors, the half-year's
'rent payable by the defender at Martinmas last, after the de-
'duction of the half-year's rent of Aultfern, amounts to L.295
'sterling, whereof there was paid, as appears by Mr Hood's two
'receipts, and the defender's bill, the sum of L.281, 4s., leaving
'a balance of L.13, 16s. due by the defender of that year's rent:
'Finds, that the half-year's rent payable by the defender at
'Whitsunday last, including the road assessment as above,
'amounts, after deduction of the half-year's rent of Aultfern,
'to L.300, whereof there has been uplifted by the pursuer L.280,
'out of the sum consigned by the defender with the Bank of
'Scotland, leaving thereby a balance of L.20, which, being add-
'ed to the balance of the Martinmas rent, makes the amount
'now due by the defender L.33, 16s.; and in payment, pro tanto,
'of this last mentioned sum, grants warrant, at the petitioner's
'instance, for uplifting the balance of L.20 sterling, consigned
'with the Bank of Scotland's agent at Inverness, and autho-
'rizes the Bank's agent to pay the same to the pursuer, with
'the periodical interest arising due on the whole sum consigned,
'and appoints the pursuer to give in a report of the sum so re-
'covered by him, and decerns accordingly; and appoints the
'defender, within fourteen days, to pay the balance now found
'due, with certification, if he fails, that warrant for selling the
'sequestrated effects, to that extent, will be granted.'

By this time the advocation in the removing process had been passed, and the declarator raised.* Both had been executed, but neither called in Court. Cameron then presented a bill of advocation of the sequestration process, ob contingentiam. The bill having been passed, the Lord Ordinary repelled the reasons of advocation, and remitted simpliciter to the Sheriff, with expenses. But the Court, on the 1st December 1824, 'altered,—
'advocated the cause,—sustained the reasons of advocation,—
'assoilzied the petitioners (Cameron's representatives) from the
'conclusion of the process,—found that the sequestration was
'illegal and oppressive,—and expenses due to the petition-
'ers, both in the Court of Session, and before the Sheriff;' and

* See preceding case.

June 13, 1827. on the 18th January adhered, on advising a reclaiming petition.*

Glengarry appealed.

Appellant.—The process of advocation of the sequestration was incompetent. There was no contingency. The declarator was not called in Court until after the advocation in the sequestration process was presented; there was, therefore, no dependence. The mere execution of a summons is not sufficient. Even if there had been a dependence, there was no contingency sufficient to warrant the advocation. And if so, the case could not be competently advocated, as it was not a concluded cause;—the question of expenses being reserved for further discussion, and other points being in dependence. And therefore, as the contingency formed the only reason of advocation, the process of advocation ought not to have been sustained.

On the merits:—The Sheriff's judgment was well-founded. There was a balance of rent due by the tenant; and after this, whether great or small, Glengarry was entitled to sequestrate. He was equally entitled to sequestrate for the current rent. Even were Cameron's plea sustained, and were it held that the Sheriff ought to have found that Cameron was entitled to possess Torrery, instead of Aultfern, at a rent to be fixed by men mutually chosen, the only consequence would be, that instead of Cameron being liable for the rent of Torrery for the year preceding Whitsunday 1822, he would be for the rent fixed by valuation. This, however, could make a very unimportant variation in the amount, and must have left untouched the appellant's right to resort to the legal remedy to recover what balance was due. There was nothing oppressive on the part of Glengarry. If a landlord sequestrates for more than is due, the sequestration nevertheless stands, to the extent of the balance due. But the question of oppression was not before the Court. If there had been any oppression, Cameron had his remedy, by an action of damages; but could not in the sequestration.

Respondents.—The advocation was competent. The merits were exhausted, and there was a contingency with the declara-

* 3 Shaw and Dunlop, No. 246.

tor. The sequestration was illegal and oppressive. At its date, June 13, 1827.
the rent of Torrery had not been fixed by valuation, as had been agreed upon, by taking into view the relative value of Aultfern and Torrery; and there were no arrears of rent due at Martinmas 1821. If Cameron was liable, as sub-tenant of M'Kinnon, then no sequestration of the Inverguseran stocking could stand for payment of the arrears of Torrery,—at any rate, not for fox-hunter's dues, and road-rates.

Master of Rolls.—As long as Cameron held under M'Kinnon, and agreed to pay his rent, how can Cameron be held not to be bound to pay a rent equal to what M'Kinnon had to pay to Glengarry? I don't see the principle on which the Court of Session proceeded.

The House of Lords ordered and adjudged 'that the interlocutor of the 1st of December 1824, complained of in the said appeal, so far only as it alters the interlocutor of the Lord Ordinary, reclaimed against, advocates the cause, sustains the reasons of advocation, and assoilzies the respondent from the conclusions of that process, be, and the same is hereby affirmed; and it is further ordered, that all other parts of the said interlocutor, and also the interlocutor of the 18th of January 1825, be, and the same is hereby reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, with instructions to remit the same to the Sheriff, to be proceeded with in terms of his interlocutor of 11th October 1822.'*

Appellant's Authorities.—50 Geo. III. c. 112. Bell on Leases, 283. Grant, 10 March 1784 (6201.)

Respondent's Authorities.—50 Geo. III. c. 112. Fyfe, 25th May 1822. 1 Shaw and Ball. No. 491.

FRASER, M'DOUGALLS, and CALLENDAR,—Solicitors.

* See, as to the application of this judgment, 6 Shaw and Dunlop, No. 21.

No. 52. Rev. Dr AULD, Appellant,—*Sir J. Connell—Keay.*
MAGISTRATES OF AYR, and HERITORS OF AYR AND ALLOWAY, Respondents,—*Wetherell—Adam—James Campbell—Wilson.*

Manse.—Stat. 1663, *c.* 21.—Found, (reversing the judgment of the Court of Session,) that the minister of a Royal Burgh, with a landward parish annexed, is entitled to a Manse under the statute 1663, c. 21.

June 13, 1827.

1ST DIVISION. Lords Gillies and Meadowbank.

THE united parishes of Ayr and Alloway are composed of the Royal Burgh of Ayr, with a landward district attached to it, and the landward parish of Alloway. Dr Auld, the incumbent of the first charge, presented a petition to the Presbytery of Ayr, setting forth, that although there was an extensive landward parish connected with the burgh of Ayr, and some land for a glebe to the minister of the first charge, yet there was no manse or glebe provided for him; and craved that a meeting should be held for taking the matter into consideration. The Presbytery met, and after hearing parties, 'found Dr Auld entitled to a manse and office-houses, as first minister of the 'united parishes of Ayr and Alloway; ordained the Magistrates 'and heritors to build the same; and plans, specifications, and 'estimates to be prepared;' which having been approved of, the Presbytery decerned and ordained 'the Magistrates of Ayr, in 'so far as their interest is concerned, and the other heriters of 'the united parishes of Ayr and Alloway, usually denominated 'the parish of Ayr, to pay their several proportions of a sum not 'exceeding L.1200 sterling, for building a manse and office-'houses for the minister of the first charge of the said parish, 'according to their respective valuations, as stated in the town's-'books, and according to which the land-tax is levied, or ac-'cording to any other mode which may be found authorised by 'law.'

A suspension of a charge on this decree was presented by the Magistrates of Ayr, and the heritors of the united parishes, on the ground that the ministers of Ayr, being ministers of a Royal Burgh, although with a landward district annexed, had no legal claim to a manse and office-houses.

The Lord Ordinary took the case to report to the Second Division, and the Court found, 'That the charger has no right 'to a manse under the Act of Parliament 1663, and decern; but 'before answer as to the specialties founded on by the charger,

'appoint him to give in a special condescendence, in terms of June 13, 1827.
'the act of sederunt, of the facts, which he avers and offers to
'prove, to instruct that he is entitled to a manse, independent
'of the said Act of Parliament.' Thereafter, on a reclaiming petition, the Court appointed parties to furnish the other Judges with copies of the pleadings, to obtain their Lordships' opinion on the point, 'Whether the charger, independently of all spe-
'cialties, is by law entitled to have a manse assigned to him,
'as minister of the united parishes of Ayr and Alloway; re-
'serving to him to be heard upon any specialties that occur in
'his case.'

The Magistrates lodged a note, stating that there was a specialty in their favour, which would supersede the determination of the general question, namely, that every part of the parish was burgal, being part of the old burgh of Ayr, and referred to the original charter of erection of the burgh, by William the Lyon. The Court, however, ordained their order to be obtempered, 'reserving to the parties to be heard upon any special-
'ties that occur in this cause.'

Lord President (Hope), Balmuto, Balgray, Succoth, Pitmilly, Gillies, and Cringletie, stated that they were 'unanimous-
'ly of opinion, that independently of all specialties, the charger
'is by law entitled to have a manse designed to him, as minis-
'ter of the united parishes of Ayr and Alloway. In point of
'principle, the Judges cannot see any distinction between a
'burgh royal, having a landward parish, and burghs of barony
'and regality having the same.

'2d, They consider the point to have been fixed by the judg-
'ment of the House of Lords in the case of Dunfermline, which
'they have always understood proceeded on the general princi-
'ple. Indeed, it appears to the Judges, that the specialties foun-
'ded on all bore the other way.' The Second Division, however, on advising petition, answers, and the above opinions, and 'whole proceedings in the cause, adhered.'*

Dr Auld now gave in a condescendence of the specialties, which were, that Alloway parish, united to Ayr about 1692, was, prior to that year, a landward parish; that a large part of the parish of Ayr proper was landward, and the old parish of

* Two of the Judges did not vote, one being an heritor, and the other Ordinary on the Bills, who was not consulted, so that, out of the remaining 13, ten voted in favour of the minister's claim, and three against it. But the three were a majority of the five sitting in the Division before which the question had come; and at this time the decision was carried by the majority of the Division before which the case depended.

June 13, 1827. Ayr was anciently a parsonage; that from time immemorial a glebe had been annexed to the benefice of Ayr, and was still in possession of the minister; that when Alloway was a separate parish, a glebe was also attached to the benefice; and although now feued out, the feu-duty belonged to the benefice; that at one time there was a manse attached to each of the benefices of Ayr and Alloway; and that the Magistrates of Ayr had paid manse rent, for nearly two centuries, to the ministers of the parish. The Magistrates answered, that a claim for a manse must rest on statute 1663, or on private agreement and contract; and that payment of manse rent (the only important specialty) was, in the books of the town, expressly mentioned as a gratuity. The Court, on reconsidering the case, on the 11th February 1823, found the letters orderly proceeded. The Magistrates and Heritors then objected, that the Court could not entertain the question of specialties in this process, since the Presbytery had no jurisdiction, except under the act 1663; and as it had been finally declared that Dr Auld had no right under that act, the decree of the Presbytery must be suspended, as being pronounced in a matter in which they had no power to determine.

The Court being equally divided, Lord Cringletie was called in, and thereon their Lordships, on the 16th June 1825, *altered* 'the interlocutor complained of, suspend the letters simpliciter, 'and decern; reserving to the charger to proceed in any other 'manner which may be competent, for establishing his right 'to a manse; and to the suspenders their defences, as accords; 'find the charger entitled to expenses, so far as incurred since 'the 11th February 1823,* subject to modification.†

Dr Auld appealed.

Appellant.—In all countries where the Christian religion prevailed, tithes, manse, and glebe, were conferred on the parochial clergy. There is evidence that manses must have been known in Scotland about the middle of the 13th century, and that the Popish clergy enjoyed them, and suitable glebes, down to the Reformation, and, after that event, the greatest anxiety is shown by the legislature in protecting the Protestant clergy from the dilapidation of their predecessors, who had set in feu, or long tack, great part of the manses and glebes. During the

* The date at which the suspenders first raised the objection to the jurisdiction.

† See 4 Shaw and Dunlop, No. 81.

usurpation, power was given (1644, c. 31,) to Presbyteries to design manses and glebes to ministers of every parish kirk within their several bounds, where no manses exist, out of kirk-lands, or, in default of kirk-lands, out of 'whatsomever lands,' —the whole heritors of the parish to contribute proportionally. At the same time, 'borrows-town kirks' are excepted; and much discussion has been created, whether, by these words, parishes, partly landward partly burgh, be or be not excluded. Their most probable interpretation, however, is, that they refer not to landward parish kirks in burgh, but to kirks in burgh not being landward parish kirks, *i. e.* a purely burgh kirk. And, therefore, under the general words of the statute, a minister of a parish, partly landward partly burgh, had right to a manse. No doubt, by 1649, c. 45, it was enacted, that burghs, and the landward parts of the parish, provide competent dwelling-places and houses for their ministers; and this has been represented as showing that previously the minister of a parish, partly landward and partly burgh, had not right to a manse. But the statute was passed, not to give ministers in that situation any new right, nor to let in borrows-town kirks, but to settle the *manner* of providing a manse, when the parish was partly landward and partly burgh, and thus preclude disputes that might otherwise arise between the magistrates and the landward heritors. In every other respect, the law remained as before. At the Restoration, both the statutes were rescinded; but, shortly thereafter, it was enacted, by 1663, c. 21, that where competent manses are not already built, the heritors of the parish, at the sight of the bishop of the diocese, &c. shall build competent manses to their ministers. These words comprehend every parish without exception, where there are heritors, *i.e.* landholders, and (as must be necessarily implied) where there is property fit to be designed for a manse. By its very words, a parish partly landward and partly burgh is included; and in its essence, and according to its spirit, it is only purely burghal kirks that are excluded. But it is said that this statute does not contain the clause as to burgh and landward parts of the parish, founded on the act 1649, c. 45; that this omission must be held to have happened ex proposito, and, therefore, the legislature did not intend that ministers whose parish was in this situation should have a right to claim designation of a manse. But this clause did not give ministers so situated a new original right. They had that by 1644, c. 31, which, indeed, was only the expression of the common law, and that statute (1644, c. 31,) supposed to except parishes partly landward and partly burgh, and the

June 13, 1827.

June 13, 1827. statute 1649, c. 45, supposed to wipe out that exception and let in parishes so situated, have both been repealed; and now it is only the statute 1663 that can be looked to as the original and substantive legislative provision for manses and glebes. But if, before the act 1649, it was at least doubtful how far the minister of a parish, partly landward partly burgh, was not entitled to a manse, as not falling under the strict meaning of the exception of 'borrows-town kirks,' how can it be maintained, that, when both the statute excepting, and the statute supposed to repeal the exception, are declared to be rescinded, the comprehensive terms of the statute 1663 can be controlled by the interpretation given to these rescinded acts? There cannot be a greater absurdity than to rule, narrow, or explain a subsisting statute by what has been erased from the statute-book. Besides, the mere omission of a clause is no declaration of the legislature either one way or other. It must also be recollected that a minister of a royal burgh, having a landward parish, is entitled to a glebe, and the rights to a glebe and manse are co-extensive. But, in point of fact, the question is no longer open. It was determined, in the case of Dunfermline, where the decision proceeded on the point of law, and not on specialties.* As to the question of jurisdiction, the objection ought to

---

* In the Case for the appellant, it is stated that the following notes of the opinions of the Judges in the Dunfermline case were taken by one of the counsel in the cause.—'*Lord Hermand.* A minister of a royal burgh, having a landward parish, is de jure 'entitled to a manse. The plea of res judicata is inapplicable to this case. The 'benefice is not to be injured by what was done by a former minister. The present 'charger does not represent him.—*Lord Craig.* The only difficulty is the res judicata; 'and it ought to be got over for the reason mentioned by Lord Hermand. The act '1663 restored the act 1649. A minister of a royal burgh, having a landward parish, 'is entitled to a manse. Besides, there is, in this case, clear evidence that the minister 'had once a manse.—*Lord Justice-Clerk.* Of the same opinion.—*Lord Meadowbank.* 'Cannot get over the res judicata. If it were not for that, I could have no doubt of the 'minister's right to a manse, both upon the general point and specialties.—*Lord President Campbell.* The act 1663 comprehends all prior enactments, 1592 among the 'rest. The judgment of our predecessors, with respect to manses in borrows-town 'kirks proceeded on a great mistake. Every parochial minister is entitled to his sti-'pend out of the teinds; he is entitled to a glebe; and he is entitled to a manse. 'The act about borrows-town kirks has nothing to do with parochial ministers. It 'appears to be Mr Falconer's opinion, that the act 1663 did not injure the right of 'the minister of a royal burgh and landward parish to a manse. As to the res ju-'dicata, owing to the reservation, the question is still open on some ground or an-'other; and it will be attended to, that "several (several only) of the Lords were of 'opinion that the act 1649 was left out of the act 1663 of purpose." The majority 'was of a different opinion; but "they agreed that the modification of L.40 Scots, 'and the minister's accepting of the same, made it no question." It is clear, however, 'that the L.40 Scots was only a temporary arrangement with the then incumbent; and 'at the time it was agreed to, that sum might be sufficient. Then, after some further

have been stated at an earlier stage of the case; and by their conduct the respondents have prorogated the jurisdiction, even if the objection were well founded. But the objection has no solidity. The Presbytery have a common law right, as well as by statute, to entertain questions and determine claims similar to the present. June 13, 1827.

Respondents.—The clergy have right to manses, not at com-

'remarks upon this point, he adds, if your Lordships cannot get over the res judicata, 'raise the house-mail to what is an adequate rent; make it L.40 sterling instead of 'L.40 Scots; but I think it would be much better to give him a manse in the ordina-'ry way. In the case of Linlithgow, the minister had also accepted of a manse-mail, 'and found entitled to a manse. The case there stronger against the minister.—*Lord* 'Bannatyne. Clear for the minister on the general grounds, but cannot get over the 'res judicata.—*Lord Methven.* Of the same opinion.—*Lord Cullen.* Did not hear 'his reason, but of opinion that the res judicata should be got over.—*Lord Woodhouse-'lee.* Held the claim not barred by res judicata.'—In regard to what took place in the House of Lords, this statement was made by the appellant:—'The appeal cases, 'both for the heritors and the minister, argue the question generally. The only spe-'cialty founded upon, or seriously referred to in either of these pleadings, is the res 'judicata, which was a specialty against the minister. The Lord Chancellor, how-'ever, held, with the Court below, that this was no sufficient bar to his claim; and it is 'indisputable, that, holding it no such bar, that great authority decided entirely upon 'the general point arising on the terms of the act of Parliament. The late Mr Hor-'ner, though not present when the judgment was delivered, expressly states, in a let-'ter to one of the appellant's counsel, that the argument at the bar "turned wholly upon 'the general question." Mr Mundell, the solicitor who conducted the case for the mi-'nister, wrote to him at the time in the following terms, with regard to what passed 'when the judgment of the Court below was affirmed:—"In moving the judgment of 'affirmance, the Chancellor did not say much; he merely adverted to what he had 'said on the day when counsel withdrew from the bar—that he had examined the 'point of res judicata, and found there was no foundation for it. With respect to the 'merits, he adverted to a position made by Sir Samuel Romilly, who had contended 'that the right of a minister in your situation was so clear under the act of Parlia-'ment, that, even if it could be made appear that the cases relied upon by the appel-'lants did not import the contrary, nothing short of a judgment in the last resort 'could give a construction to the act of Parliament negativing that right. His Lord-'ship observed, that if there had been a train of decisions, finding a minister in such a 'situation not entitled to a manse, and the country had acted on these decisions, he 'must have abided by those decisions, even though there were no judgment in the last 'resort, whatever his own opinion might be on the act of Parliament. But there did 'not appear to be any such cases; and upon the act of Parliament, there could be no 'doubt that you were entitled to a manse."

'In confirmation of what is stated in these communications, Mr James Chalmer, '(whose accuracy is well known to some of your Lordships, and who was solicitor for 'the heritors in the House of Lords,) says, in answer to a question put to him on the 'subject, that although he had preserved no distinct note of the Lord Chancellor's 'speech, the affirmance went upon the general ground. "I understand (he states in his 'letter) the affirmance to be on the general ground, that the minister of a burgh and 'landward parish was entitled to a manse, the decision marked by Lord Kilkerran in 'this very parish being held erroneous. The minister of a parish purely burghal cer-'tainly not entitled."'

June 13, 1827. mon law, but solely by statute. By statute 1644, the Presbytery has power to design manses to ministers at every parish kirk, 'borrows-toun kirks being always excepted;' and borrows-toun kirks are kirks in a borough, whether there may be landward parish attached or not. By act 1649, this exception was removed. These statutes fell under the act rescissory; and when the statute 1663, c. 21, was made, the provision in 1649 as to parish kirks was re-enacted; but the clause removing the exception as to burgh, whether with or without landward parish, is left out. It is therefore plain, that only ministers of parishes purely landward are entitled to manses. This doctrine is supported by a series of decisions. The case of Dunfermline, alleged to have decided the point another way, went upon specialties, and not on the law.

Master of Rolls.—Is it possible that the judgment in the Dunfermline case could have proceeded on any other than the general ground? I have read the papers in that case carefully, and I cannot see that it could have been decided on any other but the general point, and this House must be satisfied, that the judgment did not proceed on general principles, before it can allow the judgment to be shaken. The House of Lords affirmed the judgment of the Court of Session, that the Presbytery had a right, in the Dunfermline case, to design a manse: now, could the Presbytery have designed a manse on specialties?

Sir Charles Wetherell (for the Heritors).—There was an extremely important specialty in the Dunfermline case, namely, that the minister had once been possessed of both manse and glebe, and on this specialty the affirmance in this House proceeded.

Master of Rolls.—Your argument will just come to this—There are two grounds on which this House might have proceeded—one is agreeable to law—the other is against it; and you, in order to overcome the objection of res judicata, presume that the House went on the ground that is against all law. It is too conclusive, that either judgment went on the general grounds argued by the parties, or on a ground against law, and not hinted at by the heritors. You contend, that the Presbytery have no jurisdiction, except under 1663; but in the Dunfermline case the Presbytery designed a manse, and that designation was confirmed—Can we then, resist concluding that the House went on the general ground, and did not hold a jurisdiction to exist where none existed?

Sir Charles Wetherell.—But that is exactly a point as to which there may be a question. In the Dunfermline case the objection to the jurisdiction was not raised; it had been overlooked. We can make it plain, that, under the statutes, the appellant has no claim.

Master of Rolls.—You cannot go into them. We can't conjecture what ought to be the law, but what is the law.

Campbell (for the Heritors).—The present case certainly was not de-

cided on this ground in the Court of Session; and we understand that this Honourable House does not decide cases on grounds different from those originated in the Court below. June 13, 1827.

Master of Rolls.—The Roxburgh case was here decided on grounds which were not even touched upon or suggested in the Court below.

Sir Charles Wetherell.—If that be your Lordship's view, we need not proceed to the argument, as to want of jurisdiction; for if the appellant, in virtue of the Dunfermline case, comes under the statute 1663, the Presbytery clearly had jurisdiction.

Adam (for Magistrates of Ayr).—The appellant has no claim to a manse, seeing he is clergyman of a kirk purely burghal.

Master of Rolls.—The House having decided, that when a parish is partly burghal and partly landward, the minister has right to a manse, the decision cannot be permitted to be impugned directly or indirectly; but if you can take the case from the application of that decision, that is a different matter, and the House will most readily listen to you.

Adam.—The burgh of Ayr extends over the united parishes of Ayr and Alloway. The original charter of erection of the burgh of Ayr was granted by William the Lion. The boundary specified in the charter includes the whole extent of what was the old parish of Ayr. The lands, contained in the old parish of Alloway, were granted to the burgh by Alexander II., by charter, in the year 1236—were erected into the barony of Alloway by Robert I. 1324—to be held of the town by the same tenure, and under the same administration, as the original patrimony of the burgh. By these two last charters, the town is appointed to pay L.10 Scots of burgage-duty for the barony of Alloway. In a charter of confirmation granted by Robert III., in 1400, the burgh is appointed to pay L.10 Scots more for the whole of their other possessions (Baronia de Alway tantum excepta). By a charter of James VI. all these subjects are consolidated, and a burgage-duty of L.20 Scots appointed to be paid for the whole. Thus, the whole territory of Ayr and Alloway, that is the whole united parish, was held in burgage by a proper burghal tenure, and constituted one burgage tenement. Any subinfeudations which afterwards took place, were allowed only by special grant of the crown. Being therefore a burghal parish, the appellant has no right to a manse. At all events, none of the burden can be thrown on the Magistrates, for they are not 'heritors,' in the proper sense of the word.

The House of Lords ordered and adjudged 'that the interlocutors complained of be reversed; and it is farther ordered, 'that the cause be remitted back to the Second Division of the 'Court of Session, with an instruction, that it is fixed by the 'judgment of the House of Lords in the Dunfermline case, that 'the minister of a royal burgh, having a landward district annexed, is by law entitled to have a manse assigned to him.'

Appellant's Authorities.—Forbes's Treatise on Tithes. Hailes' Annals of the Church; 1563, c. 72; 1572; c. 84, 1592, c. 118; 1594, c. 202. 2 Ersk. Inst. 10.

June 13, 1827. 2; 1644, c. 31; 1649, c. 45; 1663, c. 21. Anderson, 17th Dec. 1664 (5121.) Fullerton, Dec. 1779 (5123). Williamson, March 26, 1685 (5121). Dunfermline (1), 30th June, 1750 (8504). Linlithgow, March 5, 1802 (in a note to report of Dunfermline, infra). Dunfermline (2), 19th Nov. 1805. (N. 1. Ap. Manse). Barclay, 15th Feb. 1795 (F. C.) Boyd, 24th Jan. 1769 (7617).

Respondent's Authorities.—Hailes's Canons of the Church, 13; 1563, c. 72; 1572, c. 48; 1612, c. 8; 1644, c. 31; 1649, c. 45; 1663, c. 21. Dunfermline (1), 30th June, 1750 (8504.) Elgin, Feb. 28, 1769 (8508). Muttar, June 16, 1784. Linlithgow, 5th March, 1802 (see Dunfermline (2). Dunfermline (2), 19th Nov. 1805 (No. 1, Ap. Manse). Erak. Inst. 2. 10. 50; 1. 2. 29.

RICHARDSON and CONNELL—J. CHALMER—MONCRIEFF and WEBSTER, *Solicitors.*

No. 53. STEPHEN ROWAN CRAWFORD, Esq., Appellant.—*Wilson—John Campbell.*
WILLIAM BENNET, Insurance-Broker, Glasgow, Respondent.—*Adam—Keay—Kaye.*

Minor.—A minor, in trade, having given a receipt for L.3000 sterling, but which was not a trade transaction, having been found liable in repetition for the whole amount, although he alleged that truly he had not received L.3000 sterling, but only certain items and orders, some of which had been paid, and others not; the *House of Lords* (reversing the judgment of the Court of Session, except as to an admitted sum,) ordered an inquiry as to the amount de facto received, or what might, without the party's wilful default, have been received, in respect of the receipt.

June 19, 1827.

1st DIVISION. Lord Alloway.

JOHN CRAWFORD, Esq. of Broadfield died, leaving a large heritable and moveable property, which, by his deed of settlement, he divided among his family,—enjoined his eldest son, as heir-at-law, to make up titles to the heritage, and convey as directed; and appointed his three eldest sons, and his widow, executors. In this succession, Stephen Rowan Crawford, the fourth son, was entitled to a money provision of L.3000; heritage, valued at L.9600; and personal funds, amounting to L.2434, 13s. 4d., to equalize his share,—in all L.15,034, 13s. 4d.

Shortly after his father's death, Stephen R. Crawford, then about seventeen years of age, went to Lisbon to attend the mercantile counting-room of his brother Joseph, then carrying on business under the firm of Joseph Tucker Crawford and Company. The partners of that house, the three eldest sons, had also a house at Port-Glasgow, under the firm of John Crawford and Company.

Unexpectedly, the house of John Crawford and Company failed, bringing down with it the house of Joseph T. Crawford

and Company; and, on this event, it was disclosed that neither the debts of the testator, nor the provisions to his family, had been paid, and that the firm, being composed of three of the appointed executors, had appropriated nearly all the executory funds to the purposes and exigences of their trade, and in lessening heavy balances owing by them, on their business account, to a house in London. William Bennet was appointed trustee. Stephen formed a connexion in business under the firm of Stephen R. Crawford and Company. June 19, 1827

Stephen R. Crawford, as a creditor of John Crawford and Company, to the extent of his money provisions, and of the eldest son, for the heritage, took legal advice in Lisbon, and under it sought redress in the Lisbon Court, and obtained an embargo order in the hands of Joseph T. Crawford, of all funds belonging to John Crawford and Company, (and of Joseph Tucker Crawford's private fund, if he broke the embargo,) 'in security of 'L.3000 that were left to Stephen R. Crawford by the will of 'his father, and that remained, according to the same in pos-'session of the said house of John Crawford and Company;' and an attachment followed,—'of whatever property might be 'found in possession of Joseph T. Crawford, partner in the 'house of John Crawford and Company, of Port-Glasgow, for 'payment of L.3000, and costs of a sentence obtained against him.' On the attachment being enforced, Stephen Rowan Crawford gave his brother, as partner in the house of John Crawford and Company, a receipt for the amount, L.3000.

Bennet instituted proceedings in Lisbon against Stephen Rowan Crawford, alleging incapacity ex minorennitate, to act without express concurrence of his curators; and on his arrival a few months after in Scotland, raised another action against him in the Court of Session, subsuming collusion with Joseph Tucker Crawford, and in both concluding for repetition of L.3000 sterling.

Stephen R. Crawford, in defence, stated, that he was indisputably a creditor of the Company, seeing that the Company had intromitted, and of the eldest son, as an individual partner, and as heir; that he had acted under legal advice; that Joseph T. Crawford had not at the moment funds to meet the Lisbon order; but, to prevent execution, he induced him to grant a receipt, for which the consideration was to be given at a future time; that continuing without sufficient funds of John Crawford and Company, Joseph soon after delivered to him various orders on other parties, some of which were honoured, others were not, and still remained utterly unproductive; that great

June 19, 1827. part of the consideration was the property of Joseph, on whose estate Bennet was not trustee, Joseph not having been sequestrated as an individual; that before raising the action, he had offered to enter into an accounting with Bennet, to refund whatever was due to the estate of John Crawford and Company, and to place that estate exactly, in this matter, as it stood before the receipt was granted; that this offer was refused, Bennet insisting for payment of L.3000 cash, whatever had been the amount, or whosesoever had been the property, of the items composing the consideration; that the defender was entitled to show what, de facto, had been truly given under the embargo; that this would have been the law in a question with a major, the passing of the receipt merely throwing the onus probandi of the amount on the defender, which otherwise would have been on the pursuer; but that, a fortiori, the receipt was not conclusive when the granter was a minor, having guardians, who had not consented, and where the transaction had no connexion with his trade or mercantile dealings.

On the other hand, Bennet stated that there had been collusion between the brothers and other relations; that the receipt was conclusive as to its amount, and could not be opened up. By means of it, Joseph T. Crawford and Company had retained L.3000 money, part of the assets of John Crawford and Company; that this state purporting to enumerate the items of the consideration, was altogether unsatisfactory and unconfirmed; that even if correct, the estate of John Crawford and Company was not to suffer from the defender's negligence, in not cashing all the orders; and that the plea of minority had no place in the question.

The Lord Ordinary found, 'That the defender, having granted the receipt libelled on to Mr Tucker Crawford, as a partner of the house of Messrs John Crawford and Company of Port-Glasgow, he is accountable for the amount thereof to the pursuer, as trustee on the sequestrated estate of the said John Crawford and Company; therefore decerned against the defender for the principal sum, and interest libelled.' Stephen Crawford then reclaimed, and prayed the Court, to find him only bound to account for what he actually received, and to afford him the means of substantiating the amount by the books of Joseph T. Crawford and Company, or by other competent evidence. The Court, however, refused his petition. He again reclaimed, producing certain states, certified to be extracts from the books of Joseph T. Crawford and Company, and repeating the prayer, as to the extent of accounting; and the Court, 'in

'respect it is admitted in the petition that the sum of L.1080 is 'due to the pursuer,' adhered to that extent and quoad ultra appointed answers; and thereafter, on resuming consideration of the petition, with answers, on the 28th May 1819, adhered to the Lord Ordinary's interlocutor, with expenses.* June 19, 1827.

Stephen Rowan Crawford appealed.

Appellant.—Throughout the whole of this transaction, the appellant acted with perfect bona fides. Being unaware of the precise legal rights of parties, he did not move a step without the advice of counsel. If he has drawn funds which belong to other persons, he was always willing to restore them to the parties who were in the true right of them; and he had, in every stage of the litigation, made that offer; but no proposal would be acceded to, but payment of L.3000 cash; that Bennet pressed for that sum, in the perfect knowledge that the appellant had not received that amount from the funds of John Crawford and Company, or of any other Company; that there was no excuse for this oppressive conduct, since it could be demonstrated from the books of Joseph T. Crawford and Company, (at this instant in Bennet's hand) that there was not cash or assets to be handed over. Production of these books had been refused, otherwise every allegation by Bennet could have been instantly disproved. The charges as to collusion with the family are irrelevant and calumnious, and were known to Bennet to be utterly unfounded.

Lord Chief-Baron.—The appellant need not say anything on that part of the case.

Wilson.—Then, that leaves little more to be stated than the legal effect of the receipt. The receipt is not conclusive. It may be opened up; and here it cannot be seriously denied, that the sum contained in it did not pass: at all events, a receipt is not conclusive against a minor; and this plea is open to the appellant's *vi exceptionis*, as he had curators who did not consent. The price of being restored, is restitution,—and that the appellant has over and over again offered. There is no warrant for the pretence, that any of the orders became unproductive through the mora of the appellant. Many of them were so, because the debtors in them had counter claims to a greater amount, and proponed compensation.

* Not reported.

June 19, 1827.

Lord Chief-Baron.—That may be quite true, but how can this House reach that fact? There has been no evidence led.

Wilson.—Of that we complain. The case has been one of broad and unvouched averment on the part of the respondent, where not only was he not obliged by the Court to prove his denied assertions, but the appellant was not allowed to disprove them. But the House can reach them thus: It is alleged by the respondent, that these orders could have been recovered; and if they were not, the loss must fall on the appellant. We answer, that they could not have been recovered, and that the trustee ought not to have stated that they could, since he at least, as trustee, could not be ignorant, that in the ranking for instance of one of the debtors in these orders on the estate of John Crawford and Company, the trustee deducted the amount of the debt due by the claimant to Joseph Tucker and Company, (viz. the debt in the order,)—thus, in effect, making the claimant pay to the trustee 20s. in the pound of the order; and yet, at the same moment, the trustee allows himself to persevere in the statement, that this very sum was either a cash payment to the appellant, or a loss through the appellant's want of vigilance. Our statement obtains relevancy from being an answer to the respondent. The receipt was not made the means of enabling Joseph T. Crawford and Company's retaining L.3000. Such a supposition was known to the respondent to be untrue, and is totally destroyed by the books in his hands, which account for the uttermost farthing of that house's intromissions.

Respondent.—Repeated the statement made in the Court of Session.

Lord Chief-Baron.—Then your argument is, that this receipt was a contract to purchase all these items, whether they turned out good or bad?

Adam.—We maintain that the appellant cannot be permitted to gainsay his own receipt.

Lord Chief Baron.—Do you contend that the receipt cannot be opened up at all?

Keay.—We consider that a written document cannot be avoided by the mere exception of a party saying, that he has not received what the receipt bears that he has. It is probatio probata until reduced.

Lord Chief Baron.—Can you refer the House to any case where a receipt was made the subject of reduction?

Keay.—At this moment I cannot.

Lord Chief Baron.—Then you rest your case on a fraud on the bankrupt law of Scotland?

Keay.—We do—and on the plea that a written receipt is held probative of its contents. That requires no further proof. It cannot be redargued by an inquiry into its component parts. June 19, 1827.

Lord Chief Baron.—Here we would hold the receipt as very good presumptive evidence, but nothing further.

Adam.—It would be unjust to allow this receipt to be opened up. The appellant alleges, that great part of the consideration given to him has proved unproductive; but is the loss arising from the appellant's mora to fall on the bankrupt estate, or is an offer of restitution now made to be listened to? The plea of minority is not open to the appellant. He cannot be relieved against his own wrong, nor against engagements in re mercatoria. If Joseph T. Crawford had not been aware that this was a transaction that could not bear inquiry, he would have stated that John Crawford and Company were sequestrated, and their funds no longer at their disposal.

The House of Lords ordered and adjudged that the several interlocutors complained of, (with the following exception)—'be and the same are hereby reversed—And inasmuch as it is 'admitted in the petition of the 12th January 1819, by the said 'appellant, presented to the said First Division of the Court 'of Session, that the sum of L.1080, 1s. 5d. Sterling, is due to 'the said respondent. It is further ordered and adjudged, that 'the interlocutor of the said First Division, bearing date the '28th January 1819, be, and the same is, hereby affirmed. And 'it is hereby further ordered and adjudged, that the cause be 'remitted back to the said Court of Session, to inquire, accord-'ing to the course of the said Court, how much the appellant 'actually received of the effects of John Crawford and Company '—or Joseph Tucker Crawford and Company—beyond the said 'L.1080, 1s. 5d.—or might, without his wilful default, have 'received in respect of the receipt signed by him; and further, 'to proceed in the said cause as shall be just and consistent 'with this judgment.'

Appellant's Authorities.—Cases *voce* 'Minor,' Morison's Dictionary. Thompson, 12 Dec. 1666, (12601.) Corsar, 14th Feb. 1672, (12601.) Dick, 8th July 1824. 3 Shaw and Dunlop, No. 173. Stair's Institutes, (Brodie's edition,) 1, 6, 33. Ersk. Institutes, 1, 7, 34, et seq. Bell's Commentaries, (5th edition,) p. 134. Ratstall, 2 Term Reports, 336.

Respondent's Authorities.—Erskine's Institutes, 1, 7, 36, 38. Waddell, 18th Jan. 1812, (F. C.)

ROBERT M. CRAWFORD,—MONCRIEFF and WEBSTER, Solicitors.

No. 54.

EARL OF STAIR, Appellant.—*Abercromby.*
EARL OF STAIR'S TRUSTEES, Respondents.—*Shadwell.*

Trust—Testament.—A party who had executed a deed of entail, having also made a trust deed of settlement, or will, by which he appointed his trustees, after paying certain legacies, and annuities to particular persons, 'to lay out the residue of the 'trust funds, interest, and proceeds thereof,' in purchasing lands to be annexed to his entailed estate, for behoof of the heirs of entail seriatim,—the trustees being paid, out of the trust-estate, the expenses disbursed by them in relation to the trust;—and the first heir of tailzie, who was also heir-at-law, having claimed the interest of the fund not invested in land, from and after the expiration of twelve months, from the death of the truster,—Held, (reversing the judgment of the Court of Session,) 1st, That, as the trust-deed imported a gift, to the several heirs of entail, of the residue of the funds thereby conveyed, and which were to be invested in land for their behoof; therefore each of them, including the appellant, was entitled to the interest and proceeds of the trust-funds, arising from and after the period of twelve months, usually allowed by the law of Scotland for payment of legacies, until the whole of these trust-funds, together with the interest prior to the twelve months, should be invested in land, in terms of the deed; 2d, That these trust-funds, including the interest prior, but not subsequent to the expiration of the twelve months, were subject to the expenses of the trust; and 3d, That the interest arising subsequent to the above period was chargeable with the expenses of the collection and application thereof, and also with those of the appeal.

June 19, 1827.

1st DIVISION. Lord Eldin.

THIS was the sequel of the case noticed, ante p. 414, which see. In addition to what is there stated, it is only necessary to mention, that, by his deed of settlement, the late Earl of Stair appointed certain annuities to be secured to particular persons, after which the residue was to be applied in the manner noticed in the above report, and declared, that the trustees 'are to be paid, out of the trust-estate, all expenses dis-'bursed by them, or any of them, in relation to the trust.' On reviewing the interlocutor which they had pronounced on the 21st of February 1826, and after consulting the other Judges in terms of the remit by the House of Lords, the Court of Session, on the 1st of March 1827, adhered.* By the interlocutor of the 21st of February 1826, their Lordships had assoilzied the trustees, 'in respect that the testator has directed that the whole 'produce of the trust-estate, both principal and interest accruing 'thereon, shall be laid out in the purchase of lands, and that 'the present is the first attempt made in Scotland, for having 'any part of the trust-estate allotted to the heir, in the mean-'time, under such circumstances; and also, in respect there 'has been no undue delay upon the part of the trustees, in lay-'ing out the trust-funds, as appointed by the truster.'

* See 5 Shaw and Dunlop, No. 248, where the opinions of the Judges will be found.

Lord Stair having then appealed, and maintained the same arguments which he formerly stated, the House of Lords pronounced this judgment:—'The Lords Spiritual and Temporal 'in parliament assembled, are of opinion, That according to the 'true construction of the trust-disposition in question, the same 'ought to be considered as containing a gift of all and sundry 'lands and heritages of the said John, Earl of Stair, deceased, '(other than and excepting those contained in any deed of en-'tail executed by the said Earl;) and also all and sundry debts 'and sums of money, heritable and moveable, owing to him in 'England or in Scotland, or elsewhere, rents of land, goods, 'gear, and moveable effects whatever, presently pertaining and 'belonging to him, or that should pertain and belong unto him 'at his death, (excepting the furniture in his house of Cul-'thorn,) together with the interest and proceeds of such several 'funds aftermentioned, to the appellant, and the several persons 'who may become entitled in succession to the lands of Cul-'quhasen and others, by virtue of the disposition and tailzie of 'the said lands of Culquhasen and others, according to the se-'veral rights and interests of the appellant, and of such several 'persons successively, in the said lands of Culquhasen and 'others, by virtue of such entail, subject nevertheless to the 'costs and expenses of the execution of the trusts of the trust-'disposition in question, except the particular costs and expen-'ses after-mentioned, and also subject to the payment of the se-'veral legacies and annuities in the said trust-disposition men-'tioned; and this House is therefore of opinion, that the appel-'lant was and is entitled, and that the several persons who shall 'from time to time succeed him in the entail of the said lands 'of Culquhasen and others, according to the course of such en-'tail, will be from time to time entitled to the interest and pro-'ceeds of the whole of the trust-funds which have arisen from 'the end of the twelve months usually allowed, according to the 'course of the law of Scotland, for payment of debts and lega-'cies, and which shall arise until the whole of the capital of 'the said trust-funds, with the interest and proceeds thereof, 'which have accrued prior to the expiration of the said twelve 'months, shall have been applied in the purchase of lands, ac-'cording to the directions contained in the said trust-disposi-'tion, after deducting out of such capital, and out of the in-'terest and proceeds accrued prior to the expiration of such 'twelve months, all costs and expenses attending the execution of 'the trusts declared by the said trust-disposition, except the 'costs and expenses attending the collection and application of

June 19, 1827.

June 19, 1827. 'such interest and proceeds which have accrued, and which 'shall accrue, after the expiration of such twelve months, which 'last-mentioned costs and expenses, this House is of opinion, 'ought to be deducted out of such interest and proceeds only; 'and this House is therefore of opinion, that the costs of all 'parties to this suit, including the costs of this appeal, inas-'much as the same particularly concern the question respecting 'the rights to such interest and proceeds, ought to be paid out 'of such interest and proceeds, as part of the costs of the appli-'cation thereof; and this House is also of opinion, that accord-'ing to the directions contained in the said trust-disposition, 'the annuities thereby given ought to be secured by appropria-'tion of a sufficient part of the capital of the said trust-funds; 'and that the funds which shall be appropriated for such pur-'pose, ought, from time to time, as such annuities shall respec-'tively cease and be determined, be applied in the purchase of 'lands as part of the capital of the said trust-funds, and that 'the interest and proceeds of the funds which shall be so ap-'propriated, after payment of such annuities respectively, and 'subject thereto, ought to be paid, from time to time, as the 'same shall accrue, to the appellant, and to such other person 'and persons as shall from time to time succeed to the appel-'lant, under the entail aforesaid, as part of the interest and pro-'ceeds of the capital directed to be applied in the purchase of 'lands, as aforesaid: And it is, therefore, ordered, that the 'cause be remitted back to the Court of Session in Scotland, to 'review all of the several interlocutors pronounced in this cause, 'and to make such orders respecting the same, and in execu-'tion of the trusts aforesaid, as shall be consistent with the 'opinions so declared by this House, and as shall be just.'

LORD REDESDALE.—My Lords, in the case in which John William Henry, Earl of Stair is the appellant, and Sir John Dalrymple, Hamilton, Macgill, and others, are the respondents, the question arose on a trust disposition executed by John, late Earl of Stair, who died in the year 1821, respecting the proceeds of a property which he disponed for the purpose of being invested in land, to be entailed on a series of heirs, of whom the appellant is the first.

My Lords, my Lord Stair, by a trust disposition, dated the 18th day of December 1815, disponed to certain trustees, who are the respondents in this appeal, 'All and sundry lands,' &c. (here his Lordship read the clause,) and 'under the same conditions, provisions, clauses, irritant and 'resolutive, contained in the disposition and tailzie of my lands of Cul-'quhasen and others, executed by me;' and then he appointed heirs of tailzie, and, under the conditions foresaid, appointed them to get the

disposition recorded in the register of tailzies. The trustees are then appointed in trust for the uses and purposes contained in the trust-deed mentioned, being his sole executors and legators, and intromitters with his whole goods and gear, and other moveables falling under the testament, with and under the exceptions foresaid, and excluding all others from that office. June 19, 1827.

My Lords, besides this trust-deed, which was executed according to the forms of the Scotch law, the late Earl of Stair also left a will drawn up in the English form. By that will, which is dated the 5th of June 1819, after making certain bequests, he gave the rest, residue, and remainder of his personal estate in England, which should not consist of real or government securities, and directed his executors to convert the same into money, and, after payment of his just and lawful debts, to invest such money in government securities: and he thereby gave and bequeathed all such stock, together with all such other stocks, funds, and securities, which he might be possessed of at the time of his death, to such uses, and for such purposes as he had in and by a certain deed and writing, prepared according to the Scotch form, executed by him, and bearing date the 18th December 1815, declared of and concerning his personal estate, and as to all estates which at the time of his death should be vested in him, upon any trust whatsoever, or by way of mortgages; he gave, devised, and bequeathed the same to the respondents in this cause, according to the nature and quality thereof, upon the trusts, and subject to the equity of redemption, which at the time of his death should be subsisting or capable of taking effect therein. The consequence of this was, that the whole of his property, except the entailed estates, under any deed executed by him for that purpose, was to be laid out in the purchase of lands, to the same uses as the entailed estates of Culquhasen.

The question which arose in this cause was with respect to the proceeds of the personal estate, from the time of the death of my Lord Stair until the whole fund should be laid out in the purchase of lands. The property amounted, I believe, to about L.200,000. The trustees invested about L.120,000 in the purchase of lands; but as they were by the will directed to invest the whole, the question which was raised was, whether my Lord Stair was not entitled to the interest from the death of the late Earl of Stair until the trustees had invested it in the purchase of land, or whether, under the words of the trust designation, they were to invest the proceeds as well as the capital in the purchase of land. My Lords, in discussing this question, which came first of all before the House during the time that my Lord Gifford usually acted as Speaker in the absence of the Lord Chancellor, the first suit having been instituted immediately upon the death of the testator, my Lord Gifford was of opinion, that at that time it was impossible to say that my Lord Stair was entitled to the interest, because, according to all the practice in the law of Scotland, a twelvemonth was allowed to the executors to convert the property, and provide for the several purposes directed by the will.

My Lord Stair, in consequence of this, instituted a second suit,

June 19, 1827. claiming the interest from and after that time of twelve months, insisting that he was to have that interest applied to his use, so far as it was not applied in the purchase of lands, the question simply, as he contended, being, what was the construction of this disposition? My Lord Gifford, when the case came before him the second time, considered it a case of very great importance in the law of Scotland; and as it did not appear that there were decisions in the law of Scotland ruling the point, he remitted the case to the Division of the Court of Session, from which it came for the purpose of taking the opinion of the Lords of the other Division so that this House might have the opinion of all the Lords upon this point. The result has been, that, with the exception of two of the Lords, my Lord Eldin and my Lord Alloway, they are of opinion that the whole interests and proceeds are to be laid out in the purchase of lands; and that until the whole are purchased, my Lord Stair is not entitled, under the trust disposition, to any interest and proceeds whatever.

The question, therefore, is upon the proper construction of this instrument; and, my Lords, it appears to me that the Lords of Session in Scotland have mistaken the meaning of the disposition of the late Lord Stair. They have supposed that my Lord Gifford acted upon an analogy between dispositions of this kind in England and dispositions of this kind in Scotland, and they seem to think that it was a sort of attempt to make what they call the Scotch law conformable to the law of England. My Lords, it seems to me that they have totally mistaken the subject. The question is not a question of law; the question is a question of intent—what was the intent of the late Earl of Stair. The late Earl of Stair has unquestionably used these words, that he gave all his personal property, after his debts and legacies were all paid, and a sum set apart for payment of the annuities, or the same were otherwise well secured, appointing his trustees to lay out the residue of the trust funds, and interest and proceeds thereof, in purchasing lands. In the first place, the interest and proceeds are not expressed definitively, but they are words which are very properly thrown in as necessary to include whatever interest or proceeds shall be due to him at the time of his death, and whatever interest or proceeds shall accrue (in the same way as in this country we have similar dispositions during the period allowed to the executors to collect the effects). Your Lordships well know, that, according to the law of England, twelve months are allowed for that purpose. According to the law of Scotland, twelve months are allowed for the same purpose. No person has right to claim against the executors of a testator before the end of a twelvemonth,—six months for the collection of the debts, and six months for the distribution of them, according to the disposition of the testator.

My Lords, it appears to me, that the true construction of this instrument is this—to give all the personal estate to the persons who shall from time to time be entitled to the lands. It is a gift to them—a gift through the medium of a trust, but a gift to them; and it would be absurd to suppose that he did not mean it equally. If the

construction which has been contended for by the trustees in Scotland were to take effect, the consequence would be, there would be an inequality; for if it should so happen, which might very well happen, that the personal estate, through debts and mortgages, and so on, could not be all collected for the course of twenty or thirty years, the present Lord Stair, and two or three other persons succeeding to the estate, might have no enjoyment of the bequest whatever, but, on the contrary, the fund would be augmenting for the benefit of the successors. It appears to me perfectly clear, that the intent of this testator was—an equal benefit to all the persons who should succeed each other in the heritages and lands taken under the deed of entail; and although this is through the medium of a trust, it is in effect a disposition for their benefit, and it strikes me, that that is the mistake that has been made by the Court of Scotland. Some of the learned Judges appear to be of opinion, and they have in truth considered the words 'interest 'and proceeds,' introduced in this disposition, as constituting no interest and proceeds, until lands should be purchased as part of the substance of the gift. Now, my Lords, I apprehend the meaning of those words is simply this—the interest and proceeds which shall not have been received at the time of the testator's death, and the interest and proceeds which shall accrue, until the ordinary time of the disposition of the personal estate. If the words had been added, 'until the money 'shall be laid out in the purchase of lands,' then, undoubtedly, that might have been the construction, but there are no such words; and I do not conceive that there is any ground for inferring, that it was the intention of the Noble Lord to give to his will a construction containing those words, those words not being to be found there. It strikes me, that even in the argument on the part of the respondents, and of the learned Judges in Scotland, they really do introduce these words into the will, which are not there, and that they have founded their decision upon that opinion.

June 19, 1827.

My Lords, you will be pleased to recollect some of the circumstances which happen in the disposition of trust property, in order to see to what extent this will go. Suppose this had happened in the case of the Duke of Queensberry, where, for twenty years together, his whole property was subject to such claims, that the executors could not execute his will, would that circumstance alter the intent of the testator? would it make the disposition different, from that which it would have been, if that circumstance had not occurred? So, suppose this trust-disposition or will had been disputed, as was the case in the matter of my Lord Fife; suppose the question to be, whether this disposition could or could not take effect, a considerable time might be employed in litigation. Your Lordships will observe, this extends to all and sundry lands of inheritance, except those contained in the deed of entail, so that it applies to all his lands of inheritance, as well as the rest of his property. I take it, that whatever is not within the power of control of the testator, is not to be conceived to be within his mind and meaning. It is important to consider, within what time he might expect

June 19, 1827. this to be concluded. There might be debts claimed by persons to whom they were not due—there might be mortgages—and it might be necessary for his creditors in England to proceed to foreclose the mortgages—they might have to sell the mortgages. Under such circumstances, that which they had to perform might have occupied a considerable length of time, before the will could be executed, and, in the meantime, the persons designated as the object of the testator's bounty might not have the benefit of the disposition at all. In this very case, part of the property given is lands; but if those lands are not in the particular counties that he mentions, I apprehend those lands must be sold, and the price of them laid out in the purchase of lands in other counties. That conversion of property it might require a considerable time to execute; and it is impossible to conceive that my Lord Stair, when he made this disposition, meant to make the favour, which he intended to give to his immediate successor, so very different from that which would be given to future successors, if the construction put upon this disposition by the Court of Session were to prevail.

My Lords, under this impression, it has struck me, that the proper manner of disposing of this case would be simply to declare your opinion upon the subject, and so refer it back, with that expression of opinion, to the Court of Session. I think that will be the best way, because, having declared your opinion upon the subject, the Court of Session will then be able to execute the intention, in such manner as to prevent any mistake on the part of your Lordships. I have always thought, that when dealing with the law of Scotland, where you are not so perfectly well acquainted with all the forms and the little difficulties which occur in the execution of a decree, it is best, generally speaking, only to declare your opinion upon the subject, and to leave the execution of that opinion to the Court below; and feeling this to be the proper mode of proceeding, I would propose to your Lordships, to declare that you are of opinion, that according to the construction of the trust-disposition in question, the same ought to be considered as containing a gift of all and sundry lands and heritages of John, late Earl of Stair, other than and except those contained in any deed of entail executed by him; and also, all and sundry debts and sums of money, heritable and moveable, owing to him in England and Scotland, and elsewhere; rents of lands, goods, gear, and moveable effects whatsoever, presently pertaining and belonging to him, or that should pertain and belong to him at his death; the furniture of his house in Culthorn, together with the interest and proceeds of such several funds after-mentioned to the appellant, and the several persons who may become entitled, in succession, to the lands of Culquhasen and others, by virtue of the disposition and tailzie of the said lands of Culquhasen and others, according to the several rights and interests of the appellant, and of such several other persons successively, in the said lands of Culquhasen and others, by virtue of such entail; subject, nevertheless, to the costs and expenses of making good the trusts of the trust-disposition in question, except the particular costs and expenses after-mentioned. That exception I approve of on this

ground. This has arisen from a question, not properly respecting the capital of the estate, but respecting the interim profits, and therefore it appears to me, referring to the words of the will, in which he appoints factors and trustees, and persons to collect the effects, and so on, it was his intention, that whatever expenses occurred, with respect to the produce of his property, whilst in the hands of trustees, should be paid out of that produce. I would, therefore, propose to your Lordships, to declare that you are of opinion, that the appellant was, and is entitled, and that the several persons, who shall from time to time succeed him in the entail of the said lands of Culquhasen and others, according to the course of such entail, will be from time to time entitled to the interest and proceeds of the whole of the trust funds, which have arisen from the end of twelve months, usually allowed, according to the course of the law of Scotland for payment of the debts and legacies, and which shall arise until the whole of the capital of that fund, with the interest and proceeds thereof which have accrued prior to the expiration of the twelve months, shall have been applied to the purchase of land, according to the directions contained in the trust disposition, after deducting out of such capital, and out of the interest and proceeds accrued prior to the expiration of such twelve months, all costs and expenses attending the execution of the trusts declared by this trust disposition, except the trusts and expenses attending the collection and application of such interest and proceeds which have accrued, and which shall accrue after the expiration of such twelve months, which last mentioned I should propose to declare that your Lordships are of opinion ought to be deducted out of such interests and proceeds only, and that your Lordships are therefore of opinion, that the costs of all parties to this suit, including the costs of this appeal, inasmuch, as the same particularly concern the question respecting the right to such interest and proceeds, ought to be paid out of such interest and proceeds, as part of the costs of the application thereof; and that your Lordships are of opinion, that, according to the directions contained in the said trust disposition, the annuities therein given ought to be secured by the appropriation of a sufficient part of the capital of said trust funds, that funds should be set apart to answer those annuities. That will be the proper way; and that the funds to be appropriated for such purpose might, from time to time, as such annuities shall respectively cease and be determined, be applied in the purchase of lands as part of the capital of said trust funds, and that the interest and proceeds of the funds which shall be appropriated, after payment of such annuities respectively, but subject thereto, ought to be paid from time to time, as the same shall accrue, to the appellant, and to such other person and persons as shall from time to time succeed to the appellant under the entail aforesaid, as part of the interest and proceeds of the capital directed to be applied in the purchase of lands as aforesaid. Then I would propose that your Lordships should order that the cause be referred back to the Court of Session to review all the several interlocutors pronounced in this cause, and to make such orders respecting the same, and in the executions of the trusts aforesaid, as shall be consistent with the opi-

June 19, 1827.

June 19, 1827. nions so declared by your Lordships, and as shall be just. If a fund is set apart to answer those annuities, that fund cannot be laid out in the purchase of land until the annuities are determined. Now, your Lordships will perceive the lands of Belhaven were to be settled according to the entail; the lands of Belhaven, therefore, could not be charged with these annuities; they were not within the provisions of the entail; nor could the lands to be purchased be charged with them. It appears to me, therefore, obvious that these words interpret, if there was any necessity for interpretation, what was the intention of my Lord Stair,—that he meant the whole property should go, from the time when, according to the law of Scotland, the effects would be considered as collected, to the same uses to which he had given the estate of Belhaven by his will. Under these circumstances, therefore, I would present this to your Lordships as the proper findings in this cause.

Lord Eldon,—My Lords, agreeing with the learned Lord in the propositions which he has stated to your Lordships, and particularly in the propriety of remitting this cause back to the Court of Session in Scotland, I am governed in the latter part of the few words I have stated by this circumstance, that the execution of the trust must be carried forward in the Court of Session in Scotland.

My Lords, having in Scotch cases, I think I may venture to say now, in practice as a counsel at your Lordships' bar, and in judicial proceedings in this House, been concerned for upwards of forty years, I must take the liberty now of saying, (and I shall have never occasion perhaps to repeat it,) that it has always been an acknowledged maxim in this House, that you are not to make the laws of Scotland in your decisions, and by your judicial proceedings, similar to the laws of England,—that is a purpose which can be accomplished only by legislation, and that it is not to be attempted in the distribution of justice here—that you are to decide here as if you were sitting in the Court of Session in Scotland; and I take the liberty of begging your Lordships to attend to this circumstance in what I have now stated, because it is quite obvious there has been an opinion entertained elsewhere that we are proceeding on a different principle. My Lords, we have never proceeded on a different principle in the long period to which I have been now adverting. At the same time, it is idle to deny, that it is extremely possible that a person whose mind is constantly intent upon what is the law of England, may sometimes feel that mind more influenced by considerations arising out of the law of England, than if he were a pure Scotch lawyer, sitting in the Court of Session in Scotland; but I can take upon myself to say for my Lord Thurlow, my Lord Rosslyn, and myself, that as far as is consistent with human infirmity, we were enabled to guard ourselves against being misled from that influence which our early occupations might introduce into our minds. To the utmost extent we have endeavoured to avoid it, and I therefore preface the few words I have to state, with professing my entire concurrence with that which is expressed by Lord Alloway and Lord Eldin, both great authorities in Scotch law, that with regard to the English cases so much founded on by the

parties, they conceive they are not authorities sufficient to warrant the proceeding of that Court, which must be directed by their own laws and by their own rules. This therefore, which your Lordships have now before you, is a case that must be decided according to the law of Scotland. June 19, 1827.

My Lords, on the other hand, there can be no manner of doubt that it is perfectly competent, in considering what the law of Scotland is in a case where we have not before us any decision in the law of Scotland which forms a precedent by which we ought to be governed,—it is perfectly competent for us to obtain what assistance we can derive in forming a proper judgment by looking at the law of England, not by transfusing the law of England into that of Scotland, but to see how far those principles, which are applicable to every law, and capable of application in the law of every country, can be, or not, made serviceable for the decision of a case which stands before your Lordships for determination. My Lords, we have not many cases which have been decided in the law of England proceeding from Courts of Equity and Courts of Law—not many cases upon this question. I think one of the first is that strong case of my Lord Thurlow, of Hutcheson v. Mamington, which was a case in which a person, if I recollect the circumstances accurately, had died possessed of a very considerable personal property, at Bath, and had left considerable sums to different individuals, with a direction, that those sums were to go over to others, in case those individuals died before they were received. My Lord Thurlow was of opinion,—and whether the principle is accurately or inaccurately applied, in the particular case, is a question that must be submitted to the mind of the man who is considering whether that principle is properly applied or not,—but my Lord Thurlow was of opinion, that there was a rule of law, which rule of law has been applied through all the subsequent cases, namely, that you are not to look at a particular intention of the testator, particularly expressed with a view to carry that into effect, if you find that the primary and principal intention of the testator, declared by the same instrument, must be disappointed, by carrying into effect that particular intention, that it leads to the laying aside all intention whatever to that which was the primary purpose of the testator. My Lord Thurlow, therefore, was of opinion, that, as it was utterly impossible to inquire how far this sum, and that sum, and the other sum, and all the different sums, which were to constitute the different legacies given to particular persons, could, or could not, with reasonable diligence, have been remitted from a distant country to this country, and actually received, it was competent to him, in looking into the whole of that instrument, not laying it down as a rule of equity, but laying it down as a principle on which he could act, guiding himself by what, he satisfied himself, was the intention of the testator; and he thought he was justified in sacrificing that which required the money to be received, to that general intention of the testator, that the persons who were the objects of his bounty should enjoy the benefit of that bounty. My Lords, then came the case of Schooll v. Bernard; as

June 19, 1827. to which, my Lords, I should be extremely sorry to think that I was wrong; because I never certainly, in the whole course of my judicial life, took more pains to be right, than I did in that case. In subsequent cases, in the case of Mr Angerstein's will, I had an opportunity of stating, that it was not my opinion that there was a general rule, which, let the will be what it might, in its terms and its expressions, must be acted upon by the House; but that you are to look to the whole, or as Lord Kenyon expressed it, to look to everything within the four corners of the will, and to see what was the intent of the testator, with respect to which you would be justified in thinking he was anxious it should be carried into execution; and I thought that that will entitled the individual to interest before the money was laid out; and I cannot in the least agree to the proposition that has been stated in the opinions of learned Judges in this case, that the mere object of the testator was to annex this property to the title of Stair—my opinion upon that being, that this testator's primary intent was, that all who were to succeed to that title, should, so far as the text and language of the will went, take a benefit under that will; that not a particular intent, but merely the leading intent, being looked to, he was anxious that each and every of them should have their proportion of the enjoyment of that fund, which, as it appears to me, was meant to be a fund to be enjoyed, and to be for the benefit of all of them. Then, my Lords, the question here is, what was the particular intent of the testator, and what was his general intent? My Lords, where you see a general intent, I apprehend that will authorize you to say, that where the general intent cannot be carried into execution, unless you give those particular words a limited meaning, then according to all cases in English Law, and in Scotch Law, in all law relating to the construction of wills, you must give that construction, which, upon the whole, best and most effectually carries into execution that which was the primary intent of the testator; and I cannot bring myself to think, that because the words 'interest and proceeds' are here,—there not being, according to what we find very frequently in wills and in deeds, a particular direction that, where money is laid out in land, all the interest that shall accrue upon that money shall also be laid out; on the other hand, there are, that which is very common in wills of this description, particular clauses, that until the money is laid out, the interest shall be enjoyed as the rents and profits would be enjoyed if the money were laid out in land; but the question here is, it being the clear intent of this testator to give a beneficial interest to every one who was to succeed to his real property purchased in the counties in which he directed the purchase to be made,—whether the mere insertion of these words 'interest and 'proceeds,' may not be satisfied by a much more limited construction of them than that construction which would make them mean interest and proceeds as they accrue, and may be received until the money shall be so laid out; so that, though this happens to be a title, which is to last for ever, if we were to apply such a principle to money so laid out in land subject to inheritance as other lands are in Scotland, it might turn

out that no one person to whom the benefit of that demise was intended might enjoy any part of that benefit but the ultimate remainder. June 19, 1827.

My Lords, it is, therefore, I apprehend, not upon any purpose of your Lordships of applying this general rule, that you are now called upon to reverse, in effect, by expressing your opinion, this determination of the Court of Session in Scotland; but you are called upon to do so, because, at least according to my view of the case, you are thereby effectuating what, upon the legal and best construction of this will, is the authorized construction of this will, by which I mean, authorized by the principles on which you are authorized to construe all wills. Upon the authorized construction of this will, you are determining that that benefit shall be given to my Lord Stair, which you think it consistent with the true intent and meaning of this will should be given to my Lord Stair; and upon these grounds, therefore, it is that I perfectly agree in the general purpose expressed in the proposition stated by my noble friend. I am also of opinion, that as the late Lord Stair has created this question himself, by the manner in which he has expressed himself respecting this purchase and this interest, the expense of deciding this question must fall upon the fund, with reference to which the question has arisen. Having said this much, my Lords, I have only to add, that I entirely concur in the proposition which has been stated to your Lordships.*

RICHARDSON AND CONNELL—GOODEVE AND RANKIN, Solicitors.

J. and C. B. LAWSONS, Appellants.—*Sir Charles Wetherell—Wilson.* No. 55.

STEWARTS and Others, Respondents.—*Keay—John Campbell.*

Legacy—Substitute or Conditional Institute.—A husband and wife having disponed, by a trust-settlement, their estates and effects to themselves jointly, for their joint and several liferents allenarly, and to trustees in fee, declaring the settlement irrevocable at the death of either; and bequeathed certain legacies, declaring, that 'in the event of the death of any of the said legatees prior to the survivor of 'us, his, her, or their legacy or legacies shall thereby fall and belong to their exe-'cutors, or next of kin;' and a legatee having survived one of the testators, but predeceased the other, Held (affirming the judgment of the Court of Session) that the legacy belonged to the legatee's nearest of kin, as conditional institutes.

THE late Colonel and Mrs Baillie, in 1811, executed a joint settlement, by which, on the inductive cause that it was made 'for the welfare of our relations and friends after mentioned,' they assigned and conveyed their whole property, both herita- June 20, 1827. 1st DIVISION. Lord Alloway.

* For the Authorities, see ante, p. 426.

June 20, 1827. ble and moveable, belonging to them, or that should belong to them at the period of the death of the party predeceasing, 'to 'and in favour of the survivor of us, in liferent, for his or her 'liferent use allenarly, and to certain trustees in fee, for pay-'ment of just and lawful debts and funeral expenses;' under the special condition, that 'the survivor of us shall enjoy a total 'liferent of the whole fund and estate, real and personal, hereby 'conveyed, during all the days of his or her life, and that with-'out any control or interruption on the part of our said trus-'tees, or any other person or persons whatever;' that the trustees should sell and dispose of, immediately on failure of the said liferent, or as soon thereafter as the trustees might see proper, the whole property and effects conveyed; and 'when the said 'subjects are so converted into money, we hereby appoint the 'said trustees, (after payment of our debts, and charges of exe-'cuting this trust,) as aforesaid, to pay the net proceeds thereof 'to the several persons herein after named, according to the por-'tions, and in the sums herein after fixed and appointed; *which* 'several sums we do hereby legate and bequeath to the persons 'after mentioned.' Among the legacies, there was bequeathed 'to Mrs Janet Hamilton, otherwise Lawson, wife of Peter 'Lawson, seedsman in Blair Street, Edinburgh, and niece of 'me, the said Euphemia Baillie, excluding the jus mariti, or 'right of administration, of her said husband, the sum of L.2000 'sterling.'—'And which several legacies shall bear interest 'from the first term of Whitsunday, or Martinmas, after the 'decease of the survivor of us, but shall not be payable for two 'years after that event;' and a longer period was allowed to the trustees, if they found it advantageous; but with power, if they saw proper, to make interim and partial payments to the legatees. The trustees were then to pay over the residue of the estate to such persons as Mrs Baillie might appoint; and in the event of her dying before Colonel Baillie, without leaving directions, then to such persons as Colonel Baillie might appoint; failing both which appointments, to such persons, 'or relations, or 'friends,' as the trustees might deem most deserving. After making a provision for the abatement of the legacies, in case of a deficiency of the funds, it was 'specially declared, that 'in the event of the death of any of the said legatees, prior to 'the survivor of us, the said Alexander and Euphemia Baillie, 'his, her, or their legacy, or legacies, shall thereby fall and be-'long to their executors, or next of kin; but in the event of 'any of the said legatees predeceasing either of us, then his, 'her, or their legacy or legacies shall fall, and lapse, and be at

'our disposal;' and failing of a joint disposal, to be at the dis- June 20, 1827.
posal of the survivor; which failing, to the trustees themselves. A procuratory of resignation and precept of sasine were granted, for infefting the survivor in liferent, and the trustees in fee. All previous settlements were revoked, and a power was reserved during their joint lives, to recall the deed; but declaring, 'at 'the same time, that, upon the death of either of us, these pre-'sents shall become an absolute and irrevocable deed, excepting 'in so far as is herein before provided.'

Thereafter the following codicil was added:—'We, Colonel 'Alexander Baillie, and Mrs Euphemia Hamilton, or Baillie, 'within designed, considering that, by the foregoing deed, we 'legated and bequeathed to Major Alexander Walker, Colonel 'Robert Walker, and Miss Barbara Walker, the sum of L.2000 'sterling each, and declared that, in the event of their survi-'ving either of us, the said legacies should fall and belong 'to their executors or next of kin; and seeing that it is our 'wish that Mrs Elizabeth Walker or Raitt, of Carphin, eldest 'daughter of the said Alexander Walker, and John Raitt, Esq. 'her husband, should be secured in the half of the said legacy, 'so bequeathed to the said Alexander Walker; that the said 'Robert Walker is married, and has no family, and that the 'said Barbara Walker is unmarried; therefore, we hereby re-'voke the foresaid legacy of L.2000 to the said Alexander Wal-'ker, to the extent of the half thereof, or L.1000 sterling; 'which sum of L.1000 sterling, we hereby legate and bequeath 'to the said Mrs Elizabeth Walker or Raitt, and John Raitt, 'her husband, in conjunct fee, and to their heirs, executors, 'and successors, declaring, that it shall be payable and bear 'interest, and be subject to the conditions, all as specified in 'the foregoing deed. With regard to the other legacies thereby 'bequeathed, and, in respect the said Robert Walker is mar-'ried, but has no family, we declare that, in the event of his 'dying without children, the destination of the foresaid legacy 'of L.2000 to him is hereby so far altered, that he shall not 'have the power of disposal of it; but, in the event of his being 'survived by Mrs Sarah Holland, or Walker his wife, that she 'shall have the liferent of the same; and, after her death, it 'shall fall and accrue to, and become part of, our residuary 'estate, under the foregoing deed, unless we, or the survivor of 'us, shall specially destine the same. And, in respect the said 'Barbara Walker is unmarried, we hereby declare, that she 'shall only have the power of disposal of the half of the fore-'said legacy of L.2000, bequeathed to her by the foregoing deed,

June 20, 1827. 'and that the other half thereof shall fall and accrue to, and 'become part of, our residuary estate, under the same, unless 'we, or the survivor of us, shall specially destine the same; 'and, in the event of her not executing any settlement of the 'other half, we hereby declare, that it shall also revert to, and 'form part of, our residuary estate, and be subject to the dis-'posal of the survivor of us, in terms of the foregoing settle-'ment.'

Colonel Baillie died in 1814—the settlement was put upon record, and the trustees entered on the management. Mrs Lawson died in 1820, and Mrs Baillie in 1823. Mrs Lawson had, by her marriage-contract, assigned to her husband 'all 'and sundry goods, gear, debts, sums of money, as well heri-'table as moveable, that are presently belonging, or resting 'and owing to her, and that shall pertain and belong to her 'during the standing of the said marriage, with all action and 'execution competent to her hereanent.' Her husband was decerned her executor, conform to decree-dative by the Commissaries of Edinburgh. He had no sons by Mrs Lawson, but appointed his two sons, by a former marriage, his sole executors, and thereafter died.

The trustees having realized the estate, a competition arose between Mr Lawson's two sons, as representing through him the legatee, Mrs Lawson, and Mrs Stewart and others, the next of kin of Mrs Lawson (the children of her sister), for the legacy left by Colonel and Mrs Baillie; and to try the question, the trustees raised a multiplepoinding. The Lord Ordinary—'In the competition between the claimant, Mrs Stewart of Sham-'belly, and the other executors and next of kin of Mrs Janet 'Hamilton, wife of Mr Peter Lawson, seedsman in Edinburgh, 'and the representatives of the late Mr Lawson her husband, 'prefers the said Mrs Stewart and the other next of kin of Mrs 'Lawson to the legacy of L.2000, in respect that it is expressly 'provided by the settlement, that in the event of the death of 'any of the said legatees prior to the survivor of us, the said 'Alexander and Euphemia Baillie, his, her, or their legacy, or 'legacies, shall thereby fall and belong to their executors or next 'of kin; and, therefore, the executors, or next of kin of Mrs 'Lawson, were called as conditional institutes, she having sur-'vived Colonel Baillie, but having died before Mrs Baillie, when 'the legacy became payable.'

On advising petition and answers, the Court being equally divided, the Lord Ordinary was called in, and his Lordship remaining of his former opinion, the Court adhered; and there-

after, on advising a reclaiming petition and answers, and a hear- June 20, 1827.
ing in presence, the Court, on the 24th January 1826, adhered.*

† *Lord Hermand* observed, I doubted the soundness of this interlocutor from the beginning, and I do so still. I have heard nothing to satisfy me that it is right. There is only one will, and it became irrevocable by the death of either of the parties; as soon as either of these died, the other could not touch it. It is said, that the legacy did not vest upon the death of one of the parties; and if it could be shown, that although the legacy did not vest upon the death of one of the parties, and if it could be shown that, although the legacy was secured by the death of one of them, without altering the will, it did not vest till the death of the survivor, then to be sure it could not be conveyed by any deed of the legatee. But, on the other hand, if it did vest, I suppose it could be assigned or conveyed by any deed which Mrs Lawson chose to execute. We must look to the whole deed. And in the will the intention is expressly stated. It is to her 'executors, or next of kin.' It is said, that this is mere tautology; and it is asked, must we take every word in a will and give a separate meaning to it? But, my Lords, where we have words which have different meanings, I apprehend we must give effect to them. It is 'to executors or next of kin,' &c. These words, and each of them, have a different meaning. The next of kin is not necessarily the executor, and as little is the executor necessarily the next of kin. Suppose the expression used had been to executors *and* next of kin, that might be more doubtful as to what was the meaning; but in such a case I would be inclined to prefer the executors, because they came first. The testator did not, and could not know, who the next of kin might be after a series of years. Nobody knows who they may be; and I think that the words used here were sufficient to show, that, according to the idea of the testator, the legatee had a right to the legacy, and power to dispose of it. Had Mrs Baillie attempted, after this deed became irrevocable by the death of her husband, to dispose of these funds in another way, I conceive that she would have been guilty of stellionate. They say that the legacy did not vest. I say it did vest; and if an attempt were made to attach it, there would not be appearance made by these trustees. They talk of a conditional institution in this case. I conceive that it was in favour of the executors or next

---

* See 4 Shaw and Dunlop, No. 261.

† These are the opinions which were laid before the House of Lords.

June 20, 1827. of kin. They say there is a term of payment. I apprehend the answer to both is the same, that 'dies cessit sed non venit.' I am quite clear, upon the whole, that this interlocutor should be altered.

Lord Balgray.—Any difficulty that was in my mind in this case has been completely removed in the course of the hearing which took place. The original grounds which I took up, and which puzzled me, were, that here was a deed, no doubt a testamentary deed, but also an onerous contract between the parties, and therefore you are not entitled to look at it as a mere testamentary deed, but you must regard it also as an onerous contract between the parties. I was very much moved at first by this, and then I was moved greatly by the trust being created, and the trustees appointed in gremio of the deed, and the declaration that in the event of the death of one of the parties—the death of either of the granters—the survivor was to be merely a liferenter, and in case of any of the legatees dying before the survivor, it was to go to their executors or next of kin. I am perfectly aware of the rules of law laid down and alluded to by the Counsel of the petitioners.

But when you look to this deed, and examine it narrowly, and find out the real intention of the parties, when I come to this, to the intention of the parties, I confess that the argument for the respondents removed all difficulty in my mind, and satisfied me that you are to interpret the 'executors, or next of 'kin,' of the legatees to be the same thing; and this difficulty being removed, I see no difficulty at all in the other parts of the case. You are to look to the trustees as holding for all parties interested. But they only could hold for those parties, who, under this will, had a vested interest. But I am quite clear that the legacies could not vest in the legatees. I am of opinion that the interlocutor is right.

Lord Craigie.—I considered this case very carefully when it was first before us, and have done so since, and I confess I was impressed by the very able pleadings which we heard at the bar. I had several doubts upon the case, but I confess I now think this judgment should be altered. This deed is of a twofold nature; it is a testamentary deed, revocable no doubt during the lifetime of the granters; but one of its characters is, that so soon as one of the parties should die, it is a grant in favour of a number of persons as legatees, and we are to consider the case which has occurred in the event I have mentioned, of one of the parties dying, by which the deed was irrevocable. I am strongly moved by the nature of the trust-deed. I see that at the time

this was executed, the parties ceased to be proprietors of the subjects; and with regard to that, the consequence in my opinion is, that the whole property and fee was transferred to the trustees, and that it was not in the power of the survivor to dispose of it immediately, nor to settle it by any testamentary deed. I conceive, with regard to the property belonging to Colonel Baillie, that Mrs Baillie had no right to interfere with it whatever. I don't think she could touch it, for it was put out of her power by Colonel Baillie's death. With respect to the personal property in herself, no doubt that was hers, and she could sell or dispose of it. But I say it was quite competent for the trustees of Colonel Baillie, to take up an inventory of all the property which belonged to him, and say, 'this is not the property of this lady.' I think they would have been right in this. The property was not vested in her, but in others; it was vested in the trustees for behoof of others. Even with regard to the residuary fund, this lady had no power at all, except that of disposal. She had a power of disposal, no doubt, but if she did not dispose by exercising this power, the property was vested in the trustees for behoof of the persons mentioned in the will; and, I think, the whole right was vested in these parties. I would wish your Lordships to attend to the terms of the provision; after directing the lands to be sold at the death of the survivor, it says, 'the 'trustees are appointed to pay the net proceeds of the sale to 'the several persons herein after named, according to the pro-'portions, and in the sums herein after fixed and appointed.' And if after this these words had followed— (His Lordship was here inaudible.) June 20, 1827.

I think it cannot be denied there was a jus crediti, a right complete and absolute, which never could be shaken. But unfortunately it is said, 'which several sums we do accordingly 'legate and bequeath to the persons after-mentioned, as fol-'lows.' Then a number of persons are named. Now, I say, these were proper enough words with regard to the first part of the subjects, during the joint lives of the parties. But, I say, they do not apply to the second event, after the death of one of them. I conceive that the word legacy was improper and inapplicable to the latter case, after the subjects had been sold. It was a payment out of funds put into the hands of certain persons for the very purpose. I am satisfied that the association which formed itself in the opinion of the framer of the deed, was just this. It is specially declared, that in the event, &c. (His Lordship here quoted a passage from the deed.) I am satisfied, that if he had not used these words, 'executor or next of kin,'

June 20, 1827. there would have been no need of any explanation. The object is to keep in the persons favoured by these testators, and who are intended to be benefitted by the grant. The words used are, that in that event of predeceasing the survivor of us, the legacies shall thereby fall and belong to their executors, or next of kin. Now, with regard to the meaning of the word 'or,' I listened with great attention to what fell from the counsel for the respondents, in his very ingenious speech, and I confess it did rather change my opinion at the time; but, after considering the matter, I am quite clear that the word 'or' is a disjunctive conjunction, and must be considered so here. I say that is the common understanding, and, according to the language of the country; it is always considered in this way in the language of the country. But further, I agree with Lord Hermand, in saying, that in a deed, a regular and legal deed, your Lordships are never to presume that any word is used without meaning; if, according to the ordinary language, you can apply a meaning to it. Now, I can apply a meaning to it, and it is that the executors and next of kin are different, and that the legacy did vest, and that it was to go to next of kin in the event of the legatee not disposing of it. It struck me that the view the counsel for the petitioners took of the codicil, was of importance. I understand perfectly this codicil applying to the powers of the parties. But what I call your Lordships' attention to is this—attend to the way in which this one is described in favour of Colonel Alexander Walker. It says, that 'the said Robert 'Walker is married, and has no family, and that the said Bar-'bara Walker is unmarried; therefore we hereby revoke the 'foresaid legacy of L.2000, to the extent of one-half thereof, or 'L.1000, which sum of L.1000 we hereby legate and bequeath 'to the said Mrs Elizabeth Walker or Raitt, and John Raitt, 'her husband, in conjunct fee, and to their heirs, executors, and 'successors.' Here the important words occur, 'and to their 'heirs, executors, and successors.' Now, I ask your Lordships, if a deed were granted to parties in conjunct fee, and to their heirs, executors, and successors, if it would not be a complete right? The right opens to those favoured, or to those who do diligence against them.

Lord Gillies.—I was of opinion, when the case was formerly before us, that the interlocutor of the Lord Ordinary was right, and I remain of that opinion still. I stated formerly upon what my opinion was rested, and need not go over these grounds again. I never entertained any doubt as to the intention here; notwithstanding all the argument, very able and very ingenious

argument at the Bar, I have never formed any different opinion. I was puzzled with some part of that argument, but it never for one moment changed my opinion of the intention. Various rules and maxims were resorted to by the counsel, but they were rules and maxims, as appears to me, which were used not to discover, but to defeat the intention of the testators. Suppose that a conditional institution was really intended here, which I think was the case, how was it to be expressed? Why, the regular way would be to take it to Mrs Lawson, whom failing, to her heirs and executors. But this would not have done, because if she did not survive the death of one of the parties, the legacy would have lapsed. June 20, 1827.

Lord President.—I confess I am in the same situation with my Lord Gillies. We are all agreed that this legacy did not lapse. It vested in the trustees for the benefit of those who were entitled to take it. That I think quite clear. But then who were entitled to take it? It could not be for behoof of Mrs Lawson, for she was dead before Mrs Baillie. It could not be for her behoof, therefore the question just comes to—what is the meaning of the word 'executors, or next of kin?' Now, as to this, I really have no difficulty. The word 'or' has, no doubt, a disjunctive meaning, but it is just as often used in a different way. Why, suppose a person were to leave one of your Lordships a legacy, how would you be designed, but as Lords of Council and Session, *or* Senators of the College of Justice. But could it ever be maintained, that the word 'or' was a disjunctive? Then, again, there is another thing as to the expression 'executors.' In ordinary language it just means, and in nine cases out of ten, when you talk of executors, you just mean, the heir in mobilibus; and nobody ever thinks of applying it to any different persons. But there is another thing that has struck me here, and that is, how comes this gentleman to call himself an executor? He is not even an executor nominate. He claims as an assignee, or creditor, and if he claims as assignee, then the case of Grahame and Hope is just in point. He claims under the marriage contract, but that does not make him an executor; so that, even strictly speaking, although we were to hold the interpretation given to executor, as different from that of next of kin, I do not see how this person could take under this will. He is neither an heir nor executor; he is only an assignee, or a creditor, and if he is an assignee, what do you make of the case of Grahame? Why, it is exactly in point. Upon the whole, I am quite clear that the interlocutor is right.

June 20, 1827. The Lawsons appealed.

Appellants.—Where there is a single testator, the legacy vests by the survivance of the legatee, and becomes transmissible by deed or by law. Where there are two testators, the joint disposing power ceases by the death of either, and the settlement becomes absolute. The legatees become irrevocably donees. There is, therefore, no room for the doctrine of conditional institution. That only can come in where the right has not vested in the donee. Much more is this the case where the legacies are given by the intervention of a trust. At the death of Colonel Baillie, this trust became irrevocable, and the right in the legatees vested. Everything concurred in the present case to strengthen this view. The fee of the funds was vested in trustees, who had no discretionary power of paying or withholding the legacies—and the investiture commenced with the first death. The deed, quoad the legacies, was irrevocable from that moment. The survivor had a right of a liferent allenarly, and a power of disposal only of the surplus over the legacies, or over the lapsed legacies. But where there is a power of disposal only if the legatee predecease both testators, it seems a necessary inference that the legacy vests if the legatee survive one of them. It is of no moment that the day of payment did not arrive until the death of both. That was necessary for the liferent of the survivor—but still the trust had become, at the death of the first, absolute in the trustees for the behoof of the legatees, and the legacies had already vested. Everything tended to show that this was the intention of the donors. The right vested in Mrs Lawson was not affected by the clause introducing the words 'executors 'or nearest of kin.' Thereby the executors nominate of the legatee would take; and whom failing, the nearest of kin. But it was not meant that only executors by blood could. The word 'or' cannot be taken here for 'and'—for if the expression 'executor' is synonymous with 'nearest of kin,' (and both mean heirs-at-law in mobilibus,) it would have been enough to have used the last. The first must have been introduced for some other purpose than merely signifying what followed. This is made clear by the codicil. The power of disposal is there taken from certain legatees, (subject to the same clause relative to predeceasing the survivor of the testators;) but that power would not thus formally have been recalled, if, by the deed, the legatees had truly no power of disposal. The respondents pretend that the codicil relates to the case of legatees surviving both testators, when the legatees would have an absolute power, which the testators meant to take away; but this is an overstrained view,

and refuted by the express reference in the codicil to legatees June 20, 1827.
'surviving either of us.' The title of the appellants is good—the jus exigendi of any debt or legacy belonging to Mrs Lawson being now in their persons.

Respondents.—Assuming that executors or next of kin are here used synonymously, it is impossible to hesitate about the meaning of the terms used in the deed. In the event of predeceasing the survivor, the legacy was to belong to the next of kin. Mrs Lawson did predecease the survivor. The condition, therefore, is purified under which the next of kin are called, and they take in their own right. This is not the case of a legacy given absolutely, but payable at some future time. It is not given merely under a suspended period of payment, but on a condition creating a conditional institution in others. This the testators had the power to do, and it is clear they also had the intention to do so. The construction of the whole deed shows that an absolute interest, implying a power of disposal, was not vested until the death of both testators. But there is no ground of distinction between executors and next of kin. 'Or' is not used here disjunctively, but to connect two explanatory synonymous words. Under them, the executor nominate is not let in. Where a legacy is left to a party and his executors, the executors will take in their own right on failure of the legatee; but that rule does not apply to executors nominate, but only to executors by blood—nor can assignees claim; for no person can convey a legacy to assignees or executors nominate, unless it be actually vested in his own person. The settlement being in the shape of a trust, is in favour of the respondent's argument. The trust suspends all vesting that could disappoint contingent rights. It remains qualified and subject to all the conditions under which it was created and constituted. The circumstance of its being irrevocable cannot have any effect in removing the condition in the trust. The interest of the conditional institutes remains exactly as it would have been without the intervention of the trust. As to the codicil, the testators were desirous of securing a particular individual in a certain sum, which, as the deed stood, would not have been so secured, either under the appellants' or the respondents' reading; and in other respects, it refers to the party surviving both testators, when his power would, if not controlled, have been absolute. The appellants have no title. The legacy was not effectually conveyed by Mrs Lawson to her husband, nor by Mr Lawson to them.

The House of Lords ordered and adjudged that the several interlocutors complained of be affirmed, with L.100 costs.

June 20, 1827. *Master of the Rolls.*—The first question is, what would be the gift, if nothing had followed affecting that gift? The words are —'To Mrs Janet Hamilton, otherwise Lawson, wife of Peter 'Lawson, seedsman in Blair Street, Edinburgh, and niece of 'me, the said Euphemia Baillie, excluding the jus mariti, or 'right of administration of her said husband, the sum of L.2000 'Sterling.' Mrs Lawson survived Colonel Baillie.—Then, on principle and authority, she would have taken a vested interest in the legacy. Now, see how the gift is affected by what follows—(and here I think that the case of Nicolson and Ramsay is so far from being favourable to the appellant, that it assists the respondents.) The testators say—'It is hereby specially 'declared, that in the event of the death of any of the said le-'gatees prior to the survivor of us, the said Alexander and Eu-'phemia Baillie, his, her, or their legacies, shall thereby fall and 'belong to their executors or nearest of kin.' Now, the testators never meant to repeat what they had done before, viz. that if the legatees survived one of the testators, they had a vested interest, and could, of course, distribute it as they thought proper; but this second clause must have been intended to express a modification or qualification of the first; therefore we must use it as introducing a modification or qualification. Suppose these words had immediately followed the legating clause, what, by the Scotch law, would have been the effect of this conjoined clause? I have looked into the authorities of the Scotch law on the point, and I am clear, that to call executors or nearest of kin, is to make the executors and nearest of kin conditional institutes. Then what is to be said when these very words are to be introduced to qualify a previous vested interest? Can we arrive at another and different conclusion, than that the conditional institutes take the legacy? It remains, therefore, only necessary to consider the codicil. I was at first misled by the recital of the early part of the codicil, holding that it referred to the case of a legatee predeceasing one of the testators. If that had been the true construction of the codicil, it would, by implication, have amounted to a declaration that, if the legatee survived either, he was to have an absolute interest. But if you continue to read, you will see that the operation of the codicil is not confined to that case. On this head also, therefore, the argument of the appellant falls to the ground. I am clearly of opinion—indeed not a doubt remains on my mind,—that the judgment of the Court of Session is consistent with the soundest principles of the Scotch law, and of English principles, as far as they are applicable to the point at issue.*

---

* The *Master of the Rolls* communicated this opinion to the parties in a private room.

Appellant's Authorities.—Nicolson, 16th Dec. 1806, (No. 2. App. Legacy.) 3 Stair's Inst. 8. 21. 3 Erak. Inst. 2. 9. Voet, 36. 2. 2. Grahame, 17th Feb. 1807, (No. 3. App. Legacy.) Blackstone's Com. vol. 2. p. 379. Duncan, 27th June 1809, (Fac. Col.) Roxburghe Cause. June 20, 1827.

Respondent's Authorities.—Grahame, 17th Feb. 1807, (No. 3. App. Legacy.) Duncan, 27th June 1809, (F. C.) Glendinning, 30th Nov. 1825, (4 Shaw and Dunlop, No. 191.) Inglis, 16th July 1760, (8084.)

RICHARDSON and CONNELL,—SPOTTISWOODE and ROBERTSON, —Solicitors.

JAMES ROSE INNES, Esq. Appellant.—*Adam—Keay.* No. 56.
JAMES, EARL OF FIFE, Respondent.

Sasine—Member of Parliament—Freehold Qualification.—Held, ex parte, (affirming the judgment of the Court of Session,) in a question relative to freehold qualification, that part of the name of one of the parcels of land enumerated in the sasine founded on having been written throughout the instrument on erasures, the sasine was not sufficient to establish the qualification.

BY a crown charter of resignation, dated the 2d, and sealed the 6th June 1825, in favour of Mrs Rose Innes, there was conveyed to her, 'hæreditarie et irredimabiliter, totas et integras 'terras dominicales, et maneriei locum de Netherdale, molen-'dinum et terras molendinarias earundem, cum multuris, se-'quelis, lie sucken et knaveship, ad easdem spectan. villam et 'terras de Husbandtown de Netherdale, Craignethertie, Cha-'peltown, Millhill, Windyedge, et Coblecroft, cum cymba vec-'toria ejusdem, et salmonum piscationibus, &c. omnes jacen. in 'parochia de Abercharder, nunc vocat. Marnoch, et vicecomi-'tatu de Banff, et sicuti dict. terræ nunc sunt divisæ in duas 'portiones, lie lots consisten. cognitæ et sub nominibus et de-'scriptione sequen. appellatæ, viz. Portio prima de Wester 'Craignethertie, sicuti in præsenti per Joannem Walker posses-'sa, Oldtown seu Husbandtown de Netherdale, et parte de Coble-'house, per Alexandrum Roberts, Coblehouse, et cymba ejus-'dem, per Johannem Courage, Harperhill et Broadgate, et parte 'de Oldtown de Netherdale, per Alexandrum Sim,' &c.; 'et 'portio secunda earundem, de prædio et molendino de Nether-'dale et Windyedge,' &c. By a clause of dispensation, sasine was allowed to be taken, 'ad maneriei locum de Netherdale, 'maneriei locum de Pittendriech, vel super fundo ullius partis 'vel portionis dict. terrarum de Netherdale aut Pittendriech, 'vel supra ulla parte terrarum aliorumque in hac antea dispo-'sit. per traditionem terræ, et lapidis fundi earundem tantum.' June 20, 1827. 1ST DIVISION.

Mrs Innes, on the 9th June, executed a disposition, in favour

June 20, 1827. of her eldest son, James Rose Innes, of 'all and whole those 'parts and portions of the lands and estate of Netherdale com- 'prehended under the first lot thereof, consisting of, and now 'known by the following names and descriptions, viz. the town 'and lands of Craignethertie, as presently possessed by John 'Walker, the town and lands of Oldtown or Husbandtown of 'Netherdale, and part of Coblehouse, by Andrew Roberts, 'Coblehouse and boat thereof, by John Courage,' &c.; and, as far as related to these lands, assigned to him the unexecuted precept of sasine in the charter. In virtue of that precept, sasine was taken in his favour on the same day. The instrument stated, that the parties passed 'ad maneriei locum de Nether- 'dale, virtute clausulæ dispensationis infra mentionatæ,' and that the bailie, holding in his hands a charter of resignation, conveying to 'Elizabetha Maria Rose Innes de Netherdale, ejusdem 'hæredibus et assignatis quibuscunque, hæreditarie et irredima- 'biliter, (inter alia) totas terras et hæreditatem postea mentio- 'nat. viz. totas et integras terras dominicales, et maneriei lo- 'cum de Netherdale, &c. villam et terras de Husbandtown de 'Netherdale, Craignethertie, &c. omnes jacen. in parochia de 'Abercharder, nunc vocat. Marnoch, et vicecomitatu de Banff, 'et sicuti dictæ terræ nunc sunt divisæ in duas portiones, lie 'lots consisten. cognitæ et sub nominibus et descriptione se- 'quen. appellatæ, viz. portio prima, de Wester Craignethertie, 'sicuti in præsenti per Joannem Walker possessa, Oldtown seu 'Husbandtown de Netherdale, et parte de Coblehouse, per An- 'dream Roberts, Coblehouse, et cymba ejusdem, per Joannem 'Courage, &c.; et portio secunda earundem de prædio et 'molendino de Netherdale et Windyedge, sicuti in præsenti 'possessa per Jacobum Andrew, &c. ac etiam habens et in suis 'manibus tenens, &c. quandam dispositionem et assignationem 'factam et concessam per dictam, &c. per quam dicta Elizabetha 'Maria Rose Innes, propter causas inibi specificatas, dedit, 'alienavit, et disposuit, ad et in favorem dicti Jacobi Rose 'Innes, ejusdem hæredum, &c. totas et integras illas partes 'prædictarum terrarum et hæreditatis de Netherdale, compre- 'hensas sub prima portione, lie lot. earundem consistentes et 'nunc cognitas et sub nominibus et descriptionibus sequentibus 'agentes, viz. villam et terras de Wester Craignethertie, sicuti 'in præsenti per Johannem Walker possessam, villam et terras 'de Oldtown seu Husbandtown de Netherdale, et parte de 'Coblehouse, per Andream Roberts, Coblehouse, et cymbam 'ejusdem, per Johannem Courage; omnibus jacentibus infra 'dict. parochiam de Abercharder, nunc vocatam Marnoch, et

'vicecomitatum de Banff, una cum ullis aliis terris sub quibus- June 29, 1827.
'cunque nominibus et descriptionibus eadem agant, quæ com-
'prehenduntur et includuntur in dicta prima portione, præ-
'dictarum terrarum, et status de Netherdale, in decreto divisi-
'onis cumulo æstimati redditus earundem, nuper lato per com-
'missionarios subsidii pro dicto vicecomitatu, et quæ dicta pri-
'ma portio inibi rata est ad quadringentas et unam libras, sex so-
'lidos, et septem denarios, et quatuor duodecimas, monetæ
'Scotiæ, aut eo circa, de toto cumulo, de quingentis quadra-
'ginta et quinque libris, quatuor solidis, et decem denariis, mo-
'netæ Scotiæ, ad quod totæ prædictæ terræ antea ratæ stabant
'in dictis libris vectigalis, aut eo circa, cum omni jure,' &c.
The instrument then recited the precept commanding sasine to be given, 'secundum formam et tenorem antedictæ cartæ nos-
'træ quam de nobis inde habet et dispensationis prædict.;' and proceeded to state, that the bailie, 'virtute dictæ cartæ et præ-
'cepti sasinæ, et clausulæ dispensationis inibi content. et officii
'per idem sibi commissi, dedit, tradidit, pariterque deliveravit,
'statum et sasinam, hæreditariam atque possessionem, realem,
'actualem, et corporalem, totarum et integrarum illarum par-
'tium et portionum de prædictis terris et hæreditate de Nether-
'dale, componen. primam portionem, lie lot earundem, et con-
'sisten. ex particularibus villis et terris de Wester Craigne-
'thertie, Oldtown seu Husbandtown de Netherdale, Coblehouse
'et cymba ejusdem, et totis aliis terris comprehensis in ea-
'dem, partibus, pendiculis, et pertinentiis, earundem supra, et
'in dicta dispositione et assignatione, magis particulariter spe-
'cificatis et descriptis, omnibus jacentibus in prædicta parochia,'
'&c. et hinc tentis ut specialiter repetitis, brevitatis causa,' &c.
The sasine was described as having been taken 'super fundum
'dictarum terrarum apud dictum maneriei locum de Netherdale,
'virtute clausulæ dispensationis in dicta carta specificat. et con-
'tent. modo mentionat. in hoc instrumento,' &c.; but the clause itself was not engrossed. Throughout the instrument, 'house,' part of the name 'Coblehouse,' was written on an erasure.

Founding on these titles, and a certificate of valuation, Mr Innes claimed to be enrolled as a freeholder, at a meeting held on the 29th June 1825, for the election of a representative. Against this claim, Lord Fife objected, 'that among other
'lands on which the claimant demands enrolment, are the
'town and lands of Oldtown or Husbandtown of Netherdale,
'and part of Coblehouse, (possessed) by Andrew Roberts, Coble-
'house, and boat thereof, by John Courage;' but from essential
'vitiations and erasures in the instrument of sasine produced,

June 20, 1827. 'there is no legal evidence that sasine of the said lands of Co-
'blehouse, or any part thereof, has ever been delivered to the
'claimant, or that he stands at this moment infeft therein.
'The objection equally strikes against the qualification of the
'claimant in point of extent of valuation, inasmuch as there is
'no evidence that, without the said lands of Coblehouse, he is
'possessed of L.400 Scots of valuation.'*

Mr Innes answered, 'that the erasure or vitiation is not in
'substantialibus. There can be no dispute that sasine was
'given of all the lands contained in the conveyance. Fur-
'ther, the charter, and the conveyance, and the instrument of
'sasine, comprehended generally all the lands, contained in
'lot first of the estate of Netherdale, as ascertained by the
'decreet of division of the commissioners of supply; and, there-
'fore, any enumeration of particulars was superfluous; while
'that decreet proves, at the same time, that the valuation of the
'lands contained in lot first exceeds L.400 Scots. The charter
'in favour of Mrs Rose Innes refers to a division of the valued
'rent of the estate of Netherdale, and it describes particularly
'certain lands as being comprehended under the first lot, and
'certain other lands as being comprehended in lot second; and
'the disposition by Mrs Rose Innes, after conveying certain lands
'by name, gives to the claimant all the lands comprehended in
'lot first, under whatever other name the same may go; and
'the sasine is in exact conformity to that general description.'

A majority of the freeholders having sustained the objection, Mr Innes complained to the Court of Session. The Lord Ordinary (to whom the case was remitted for preparation) reported it on Cases; and thereafter the Court submitted this question to the other Judges:—'It being admitted, that the latter
'part of the word Coblehouse in the sasine is written on an
'erasure, does this constitute such an objection as to vitiate the
'sasine, and render it null and void?' The Judges (Lords Cringletie and Eldin dissenting) were of opinion 'that the era-
'sures in the different passages of the sasine in favour of the
'complainer as to the latter part of the word Coblehouse, vi-
'tiate the sasine, and render it null and void.' Thereon, the

* It was likewise objected that the claimant's disposition gave him right to the 'lands 'of Craignethertie,' while his sasine applied to the 'lands of Wester Craignethertie;' and the plea was also maintained, that the sasine was given at the manor-place of Netherdale, in virtue of a clause of dispensation, which was only thus noticed, 'virtute 'clausulæ dispensationis infra mentionat.' and not afterwards contained in the instrument. But these objections were not considered by the Court to be of weight, and did not enter into the discussion at the bar of the House of Lords.

Court, on the 10th March 1827, 'having resumed consider- June 20, 1827.
'ation of the petition and complaint, with the opinion of the 'Judges of the Second Division, and the permanent Lord Ordi- 'nary, in respect of the erasures in the instrument of sasine 'founded on by the complainer, dismiss the petition and com- 'plaint, and decern; find the complainer liable to the respon- 'dent in the statutory penalty of L.30 sterling, and full ex- 'penses of process.'*

The complainer appealed, but no appearance was made for Lord Fife.

Appellant.—The erasure is such as to exclude all suspicion of fraud. The instrument was recorded on the very day the sasine was given; and the record agrees with the sasine in description. The deeds referred to in the instruments are identified. The erasures occur in three places: in stating the contents of Mrs Innes' charter of resignation,—of her disposition and assignation to the appellant,—and in the enumeration of the lands in which sasine was given. None of these erasures can be considered as vitiations in substantialibus. As to the two first,—the charter and disposition are admitted to be unchallengeable; but the instrument of sasine merely gives the contents of these deeds; and there are no legal grounds for holding that an error in that recapitulation,—an error that can be instantly corrected by reference to the principal,—must be fatal. As to the third erasure:—it occurs in a passage in the instrument, which passage, without injury to the appellant, might have been omitted altogether. Symbolical delivery was given, 'Totarum et integrarum illarum partium et portionum de præ- 'dictis terris et hæreditate de Netherdale componen. primam 'portionem lie lot earundem.' If the notary had stopped here, this clause would (the instrument narrating also the dispositive clause of the charter, and the conveyance to the appellant 'of 'all and whole those parts of the aforesaid lands and estate of 'Netherdale, comprehended under the first lot of the same') have been sufficient to include all the different parcels of land contained in lot first. But the circumstance of the notary having, ex superabundante, again entered on an enumeration, was not of such moment as to weaken the previous certification, that sasine had, de facto, passed on all; and at all events, it was ad-

* See 5 Shaw and Dunlop, No. 285.

June 20, 1827. mitted that sasine was given of lands, (whether Coblehouse or not,) the name of which began with 'Coble.' In short, this instrument narrates most minutely the terms of the crown-charter, specifying the particular lands comprehended in lot L of the estate of Netherdale; it describes the import of the conveyance, in favour of the appellant, of all the lands contained in that first lot; it distinctly records, that sasine was given to the appellant in them; and it certifies, that everything was done in precise conformity to the warrants. Let the respondent read 'Cobleton,' or 'Coblecroft,' still that would have been held a clerical error, unworthy of observation.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutor complained of affirmed.

Appellant's Authorities.—Boyd, Feb. 23, 1822. (1 Shaw and Ball, No. 395.) Napier, June 25, 1822. (1 Shaw and Ball, No. 571.) Denniston, July 7, 1822. (2 Shaw and Dunlop, No. 164.)

No. 57.

CHARLES CRAIGIE, Appellant.
J. MILL, Respondent.

Jurisdiction—Suspension—Statutes 4 *Geo. IV. c.* 26. *and* 25 *Geo. III. c.* 51.—A party, who was the owner of a hackney-coach, having been convicted under the above statutes, relative to the post-horse duties, by a Justice of the Peace, and it being provided that any party aggrieved 'shall and may, upon finding security for 'the penalties and costs, appeal to the Justices of the Peace at the next quarter 'sessions,' and the party having, instead of so appealing, presented a bill of suspension to the Court of Session, on alleged informalities, and excess of jurisdiction. Held ex parte (affirming the judgment of the Court of Session,) that the bill was incompetent.

June 25, 1827.

1st Division Bill Chamber. Lord Eldin.

By the 4th of Geo. IV. c. 26, relative to the post-horse duties, it is enacted, that 'every person letting for hire, or using 'any horse, mare, &c., for drawing any such coaches or other 'carriages, to be used as hackney-coaches, any distance not ex-'ceeding five miles from the general post-office of any city,' &c., shall pay a duty of 5s. per week, if the coach be drawn by two horses. And it is also provided, 'that the person or persons 'letting for hire, or using any horse, mare, or gelding, for draw-'ing any such coach or carriage, as, or in the nature of, a hack-'ney-coach, shall take out a license expressly authorizing him, 'her, or them, so to do.' The 25th Geo. III. c. 51, had already enacted, that it 'shall and may be lawful to and for any Jus-

'tice of the Peace, residing near the place where the offence 'shall be committed, to hear and determine any offence against 'this act,' and to subject the defendeas to certain punishments described; but it is declared, that 'if any person or persons 'shall find himself, herself, or themselves aggrieved by the 'judgment or sentence of any such Justice, then he, she, or they 'shall or may, upon finding security for the penalties and costs, 'appeal to the Justices of Peace at the next general quarter 'sessions for the county;' and the statute 4th Geo. IV. c. 26, declares, that 'no such proceeding so to be had or taken, shall 'be quashed or vacated for want of form, or removed by certi- 'orari, &c., nor shall any such proceeding before such Justice 'be taken or removed by certiorari, suspension, advocation, or 'reduction, or by any other writ, process, or proceeding, into 'the Court of Session, Court of Exchequer, or Court of Jus- 'ticiary in Scotland, any law or statute to the contrary not- 'withstanding.' June 25, 1827.

Mill, farmer of the post-horse duties in Scotland, filed an information before a Justice of Peace against George Craigie of Edinburgh, hackney-coach hirer, for breach of the 4th Geo. IV., by letting for hire two horses, without having a license. Craigie had a son also a coach-hirer, of the same name, and the messenger cited the defender as 'George Craigie, se- 'nior.' Craigie appeared on the day of citation, but the diet being adjourned, he was cited to a new day, and another adjournment having taken place, a fresh citation was given, to which he appeared, was convicted, and found liable in the modified statutory penalty. He presented a bill of suspension, and maintained that the bill was competent, in respect of the Justices having exceeded their powers;—1st, Because the description, 'senior,' (under which he had been cited,) was not in the information;—2d, Because one warrant could not support citations to three different diets; and 3d, Because he was driver of a hackney-coach, and hackney-coaches were under the regulation of the police statute of Edinburgh; and the post-horse duty statutes declare, that nothing contained in them shall be construed to extend 'to coaches or carriages which are or hereaf- 'ter may be subject to the provisions contained in any local act 'or acts of Parliament.' The Lord Ordinary, 'in respect of the 'plea of the suspender, that the sentence complained of exceed- 'ed the power of the Justice, and that no satisfactory answer 'had been made to that plea, passed the bill upon caution.' But the Court, on the 11th February 1826, altered and remit-

June 25, 1827. ted to refuse it as incompetent, in respect the suspender had not appealed to the quarter sessions.*

Craigie appealed. Mill made no appearance.

The House of Lords (per the Lord Chief Baron,) ordered and adjudged that the interlocutor complained of be affirmed.

Appellant's Authorities.—Cook, May 17, 1823.—(2 Shaw and Dunlop, No. 295.)—Campbell, June 28, 1823.—(2 Shaw and Dunlop, No. 418.)

No. 58. HIS MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND, ex relatione of GEORGE FORESTER and Others, Plaintiff in Error.—*Sir C. Wetherell—Miller.*

EARL OF HOPETOUN and Others, Defendants in Error.—*Shadwell—Adam.*

Et e Contra.

Statute—Privilege.—Found (affirming the judgment of the Court of Exchequer,) that the lead and ore raised from the mines of Waterhead, &c., belonging to the Earl of Hopetoun, are only liable in the valorem duties of ten shillings and of L.1, for every L.100 exported in terms of the statutes imposing the same, but are exempt from all other duties.

June 26, 1827. EXCHEQUER. THE question in which this writ of error was taken, involved the right of the Earl of Hopetoun, and the lessees of his lead mines of Waterhead, &c., in Scotland, to export the lead thence obtained duty free, in consequence of certain exemptions from duty granted and enjoyed before the union of England and Scotland, and alleged to have been specially preserved by the treaty of Union, and by subsequent Acts of Parliament of the United Kingdom, imposing duties on lead exported.

In order to try the point, ten parcels of lead were tendered at Leith for exportation, without payment of any duty. These were severally seized by an officer of customs as forfeited, for non-payment of the duties imposed by certain statutes, and an information was exhibited in the Court of Exchequer in Scotland, for condemnation. To this information the defenders pleaded the general issue, that the said goods were not shipped

---

* See 4 Shaw and Dunlop, No. 296.

or put on board contrary to the form of the said statutes. The case came before a jury, and a special verdict followed, in substance finding:—That the lead was produced from ore raised from mines in the lands of Waterhead, or Glengonarhead, in Lanarkshire, and mentioned in the charter and statutes after specified. Charles the First, by charter under the great seal, of date 8th September, 1641, granted to Hope of Waterhead, and his spouse, in liferent, and Thomas Hope, their eldest son, in fee, an heritable right to these mines, bearing express liberty and exemption from custom, on which infeftment followed. This grant was ratified in the Parliament of Scotland in 1644–1661, and for further security both the lands, mines, minerals, and others, and likewise the customs of the lead ore, were dissolved from his Majesty's crown, and from all annexies to the same, and dispensing with the foresaid dissolution, as if it had been made prior to the granting of Hope's right. After this a charter followed, containing an exemption from all customs for the space of three nineteen years. In 1662 a new charter was granted, containing a tack of three nineteen years under the like exemptions. In these charters the fiars, as they successively succeeded, took infeftments. In the meantime, during the usurpation, the Commissioners of Customs having insisted that duties should be paid on the ore or lead, James Hope granted bond for the duties, but on which a charge for payment was suspended by the Commissioners for administration of Justice in Scotland; and after the Restoration, the tacksmen of the customs had credit given them for duties on the Hopetoun lead exported. Thereafter John Hope, the successor of James, was charged for duties, from 1644, and decerned by the Lords of the Treasury to pay the same, but with a recommendation to the King to exoner him of 2-3ds during the time past; and in 1690 and 1692, the Lords of the Treasury and Exchequer discharged the exaction of the duty until further orders; and on a petition, a remit was made by King William to the Lords of the Treasury, who, having remitted to Sir James Stewart, the Lord Advocate, he reported in favour of the exemption, both as to bygones and to come, and a committee of the Lords of Treasury and Exchequer, found that the exemption ought to be maintained, 'for the encouragement of so great and useful a work,' and that this might be done by an act of Exchequer, both as to bygones and in time coming, without the necessity of the formality of a reduction. In 1695, John was succeeded by Charles Hope, who was infeft on a charter containing the exemptions, and the lead and ore

June 26, 1827.

June 26, 1827. were excepted out of the tacks of customs and excise in 1697–1705. In 1700, the Lords of the Treasury, on the petition of Charles, declared that the lead and ore were free from payment of duty, and discharged the tacksmen of the duties from exacting it. At the Union, Charles, now Earl of Hopetoun, having claimed to export his lead and ore duty free, an exemption in his favour was entered among the list of exemptions, transmitted by order to the High Treasurer of Great Britain; and from 1707 until 1798, he and his successors enjoyed that exemption, when the duty imposed by 38 Geo. III. was charged. Further duties were afterwards imposed, particularly by 49 Geo. III. c. 98, an ad valorem of 10s. per ton, and particularly a war duty of L.1 per L.100. These duties were paid under protest from 1801, and in 1811, lead being tendered free of duty, was seized. The jurors concluded by finding for the plaintiffs, if the duties demanded were respectively due and payable; but for the defendants, if the duties were not due and payable.

This special verdict was argued in the Court of Exchequer, and on judgment being given, that the defendants were not liable in any of the duties claimed, except the ad valorem duties of 10s., and of the war duty of L.1 for every L.100, the plaintiff brought a writ of error, and the defendants a cross writ of error.

Plaintiff on original writ.—The charters and infeftments granted to the predecessors of the Earl of Hopetoun, and the ratification thereof in the Parliament of Scotland, were not sufficient to establish the right of exemption from duties claimed in this case. In Scotland, the Crown could not convey away its annexed property, or hereditary revenue, except these were previously dissolved from the Crown, and power given to grant them away by a public act of Parliament; nor could a prior invested grant be confirmed and rendered free from objection by a subsequent ratification in Parliament, with a dissolution joined to the ratification. There has been no res judicata in favour of the exemption claimed. By the sixth Article of the treaty of Union, the export duty imposed by the English act of Charles II. c. 4, became payable generally in Scotland, and the exception in that article did not alter the rights of the Hopetoun family, or create an exemption if none previously existed. At all events, the exemption cannot extend to the new duties on lead imposed by the statutes of Great Britain, or of Great Britain and Ireland. The exemptions in favour of private rights

in the statutes, 27 Geo. III. c. 13—43 Geo. III. c. 68—and 49 Geo. III. c. 98, extended no farther than already bestowed by the sixth article of the treaty of Union. No lapse of time, or erroneous practice, can validate the exemption. Quod non est alienabile non est præscriptibile, et nullum tempus occurrit regi. June 26, 1827.

On cross writ.—The ad valorem duty of 10s., and the L.1, were duties imposed to repay the expenses of the war, from which there can be no exemption by inference.

Defendants on original and Plaintiffs on cross writ.—By the grants and acts of Parliament, lead, from the mines in question, is exempted from the payment of customs or other duties, and that exemption is saved by the treaty of Union. It is not to be presumed that the legislature meant to take away that privilege. On the contrary, by a just construction of the statutes since the Union, that exemption is recognised and admitted.

The House of Lords ordered and adjudged that the judgment given in the Court of Exchequer in Scotland be affirmed. *

J. CHAMBERS—SPOTTISWOODE and ROBERTSON, Solicitors.

The statutes relating to the duties on lead exported are, 12 Car. II. c. 4—19 Geo. III. c. 25—22 Geo. III. c. 66—24 Geo. II. c. 49—27 Geo. III. c. 13—37 Geo. III. c. 15—38 Geo. III. c. 76—41 Geo. III. c. 28—42 Geo. III. c. 43—43 Geo. III. c. 68, 70—49 Geo. III. c. 98.

---

* Of same date was determined the case between his Majesty's Advocate and the Duke of Buccleuch and Queensberry, relative to the lead and ore produced from the mines of Drumlanrig and Sanquhar, the property of the Duke. By an act of dissolution of the 'mines and minerals belonging to James Duke of Queensberry,' (25th March 1707), it is declared that the said 'mines, metal, and minerals are, and shall 'be possessed in all time coming by the said Duke of Queensberry, and his foresaids, 'with express freedom and exemption from all payment of custom, bullion, shore-'dues, or any other dues whatsomever, payable for any of the said metals or minerals, 'in all time coming, with full power to export and transport the said metals and mi-'nerals into foreign countries, free from the said dues, and other customs, and dues 'whatsomever, either laid on, or to be laid on.' In November of that year, the Duke claimed of the Commissioners of Customs that lead ore wrought from his mines should be exported, free of duty, which they allowed; and the exemption appears in the list of exemptions transmitted on an order of the Treasury. The lead and ore was thereafter permitted to be exported free of duty until the passing of the statutes, 38 Geo. III. c. 76; 41 Geo. III. c. 28; 42 Geo. III. c. 43; 43 Geo. III. c. 68—70; 49 Geo. III. c. 98. The duties leviable by which, the Duke or his lessees paid under protest.

The question as to liability was argued on a special verdict in Exchequer, and received the same decision both there and in the House of Lords, as was pronounced in the case of the Earl of Hopetoun.

No. 59. JOHN GIBSON and Others, Noble's Trustees, Appellants. MRS WATSON, or GILBERT, and Husband, Respondents.

Reduction—Facility—Writ.—Held, (affirming the judgment of the Court of Session,) that a deed of settlement was not effectual, which had been executed by a party who was found by the verdict of a jury to be capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revoking or altering it, and as not being her free and voluntary act, although not obtained by the undue influence of the parties in whose favour it was granted.

June 29, 1827.

2D DIVISION. Lord Cringletie.

MRS NOBLE, on the 6th of May 1815, executed a trust-disposition and settlement, whereby she disponed her whole estates, in favour of trustees, for payment of her debts and funeral expenses,—to convey the fee of one half of the lands of Badinsgill to one of her nieces, Mrs Hamilton, whom failing, to Mrs Hamilton's husband; to convey the fee of one half of the croft acres and houses at Biggar to him, whom failing, to Mrs Hamilton; in the event of their death, before execution of these deeds, to sell these subjects, and divide the price among Mr and Mrs Hamilton's children; to sell and dispose of the remainder of the heritable and moveable estate, and out of the proceeds thereof to pay the truster's other niece, Mrs Gilbert, L.100, and divide the remainder equally between Mrs Gilbert's and Mrs Hamilton's children. Mrs Noble labouring under defect of sight, the deed was executed by notaries.

In this deed Mrs Noble reserved her liferent, but she did not reserve a power to revoke or alter; nor was a clause introduced dispensing with delivery. It neither contained procuratory of resignation, nor precept of seisin.

The disposition was delivered to the trustees, and thereafter the following supplementary deed was executed, 2d August 1815:—'Considering that, on the 6th May 1815, I executed a 'trust-disposition and settlement in favour of James Hamilton, '&c. for the purposes therein mentioned, and delivered the 'said deed to a majority of the said trustees, without reserving 'any power to revoke or alter the same, it being my intention 'at the time to render it absolute and irrevocable; and seeing 'that the said conveyance cannot be used for vesting the heritable subjects thereby conveyed to my said trustees, from the 'want of the necessary clauses, and that I am desirous to re-

'medy that defect, and to express more fully the irrevocable 'nature of the said right, so as to leave no doubt of my intention on that point; therefore, I do hereby give, grant, and irrevocably dispone to my said trustees, as expressed in the foresaid deed, with the powers and faculties therein expressed, and for the ends and purposes therein specified, the lands, annual-rents, and heritages, therein and herein after described, reserving only my own liferent use of the same,' &c.; 'and in order to give full effect to this deed, and to the foresaid trust-disposition and settlement, I not only revoke all former settlements, but I declare this to be a delivered evident, to the effect of depriving me of all power of altering the same.' The deed was signed by notaries, whose doquet bears, that they did so at her special request, 'the above deed having been previously read over to her, and she approving of the same in presence of the witnesses also named and designed.' A procuratory of resignation, and precept of seisin were introduced, on which the trustees took infeftment, and recorded the seisin. Mrs Noble died on 17th May 1820.

June 29, 1827.

Mrs Gilbert and husband raised an action of reduction of these settlements, on the grounds, that they 'were subscribed by 'notaries public for the said Margaret Dickson, alias Noble, 'who received no proper authority to execute the same for her, 'and had no previous conversation with, or instructions from 'her, authorizing them to do so. At the time the foresaid 'two deeds of settlement were executed, the said deceased Margaret Noble was in such a weak and debilitated state, both 'of body and mind, as to disqualify her from understanding 'the nature and import thereof, and render her incapable of 'conceiving the plan, and giving directions for framing such 'deeds of settlement; and the same were concocted, prepared, 'and extended, for the purpose of being executed without the 'man of business who prepared the same having proper instructions from the said Margaret Dickson, alias Noble, or any 'communication or conversation with her thereanent, he having 'received his instructions solely from the said James Hamilton, 'writer at Biggar, and his family, in whose favour, and for 'whose behoof and benefit the deeds were granted, or from 'their connexions and relations, and that without any communication or advisement with the said deceased Margaret Dickson, alias Noble, or with the pursuer, Grizel Watson (Gilbert), 'and her husband, who are equally related to the said deceased 'Margaret Dickson, alias Noble, but who were kept altogether 'ignorant of the execution of said deeds of settlement; and the

June 29, 1827. 'said deeds were not the free and voluntary expression of the 'will of the said Margaret Dickson, alias Noble; but it was by 'means of the undue influence used by the said James Hamil- 'ton and his family, and their connexions, over the said Mar- 'garet Dickson, alias Noble, that she was prevailed upon to ap- 'pear to authorize said deeds to be executed for her, if she ever 'did give authority, or apparent authority, to the notaries by 'whom the deeds are subscribed, to execute the same for her.'

Thereafter certain issues were sent to the Jury Court for trial. To the two first of these, which inquired whether, at the date of the deeds under reduction, Mrs Noble 'was of a 'sound and disposing mind, and capable of understanding her 'affairs?' the jury returned a verdict, finding, that 'she was in 'such a state of mind as to be capable of disposing of her es- 'tate and effects.' And in answer to the other issues, they found, that 'the said Margaret Dickson, on the 6th May, and '22d August, 1815, was not blind, but laboured under a de- 'fect of sight; yet not such as to render her incapable *of read*- 'ing or seeing what she might write. That there is no evidence 'before the jury, that Margaret Dickson gave instructions to 'prepare either the deed of 6th May, or 22d August, 1815; that 'on 22d August 1815, the previous deed of 6th May was not read 'over, nor the tenor thereof explained to the said Margaret 'Dickson; and that on the 6th May, and 22d August, 1815, the 'said Margaret Dickson declared, that, from defect of sight 'she was unable to sign the deed aforesaid, and that she in- 'structed notaries to sign on her behalf.'

The Lord Ordinary repelled the reasons of reduction, and assoilzied. But the Court appointed new and additional issues. '1. Whether Mrs Margaret Dickson, or Noble, at the date of the 'trust settlement in May 1815, and the subsequent one of 22d 'August of the same year, was in such a state of mind as ena- 'bled her to judge correctly with regard to the effect of the said 'deeds, as depriving her of all power of revoking or altering 'the same. 2. Whether those deeds were the free and volun- 'tary acts of Mrs Noble, or obtained by the undue influence of 'the defenders, or one or other of them. 3. Whether, from the 'date of the factory* granted by Mrs Noble to the defender, 'James Hamilton, to that of the settlement just mentioned, or 'afterwards, while she lived, Mrs Noble settled accounts with 'Mr Hamilton. 4. Whether Mrs Noble, at the date of the two

* On 9th February, 1815, Mrs Noble had executed a factory in favour of Hamilton, proceeding on the narrative of 'my being, from old age, unable to manage my 'affairs, and having full confidence in the fidelity and attention of James Hamilton.'

'deeds respectively, could write or subscribe those deeds. 5. June 29, 1827.
'Whether, at the execution of the two deeds above mentioned,
'the said Mrs Margaret Dickson, or Noble, explained to the no-
'taries the object she had in view in making use of their pro-
'fessional assistance, or did express her assent to, or acquies-
'cence in such explanation, if any was given in her presence.'

To these issues the following verdict was returned:—'1.
'That Mrs Dickson, or Noble, at the date of the trust settle-
'ment in May 1815, and the subsequent one, 22d August of the
'same year, was not in such a state of mind as to enable her to
'judge correctly with regard to the effect of the said deeds, as
'depriving her of all power of revoking or altering the same.
'2. That these deeds are not the free and voluntary acts of Mrs
'Noble; but there is not sufficient evidence to show that they
'were obtained by the undue influence of the defenders, or one
'or other of them. 3. That from the date of the factory grant-
'ed by Mrs Noble to the defender James Hamilton, to that of
'the settlement first mentioned, or afterwards, while she lived,
'there was no evidence that any accounts were regularly set-
'tled betwixt Mrs Noble and Mr Hamilton, her factor. 4.
'Finds for the defenders, in respect that no evidence was pro-
'duced by the pursuers. 5. That at the execution of the two
'deeds above-mentioned, the said Mrs Dickson, or Noble, ex-
'plained to the notaries the object she had in view in making
'use of their professional assistance, by declaring that she could
'not see to write by reason of blindness.' The Court refused the defender a new trial; and thereafter, on the 18th November 1825,* on consideration of the issues tried before the Jury Court—verdicts returned thereon—mutual information for the parties, and whole proceedings altered, the interlocutors sustained the reasons of reduction of the deeds quarrelled, and reduced, decerned, and declared, in terms of the reductive conclusions of the libel.†

---

* See 4 Shaw and Dunlop, No. 167.

† At the second trial, the appellants proposed to examine Hamilton Ritchie as a witness, to prove that he, as the agent of Mrs Noble, received instructions from her to prepare the trust deed; but his admissibility was objected to by the respondents, on 'these grounds:—1st, Because he was nominated a trustee by the late Mrs Noble in 'the deed under reduction. 2dly, Because he is a defender in the present action, and 'interested by paying the expenses which may be incurred in defending the action. '3dly, Because he is the nephew of James Hamilton, residing in Biggar, one of the 'parties benefitted by the deed of the said Mrs Noble, sought to be reduced by the pre-'sent action.' The Court having sustained the objections, the appellants presented a bill of exceptions. '1st, Because, though appointed a trustee by the late Mrs Noble 'in the deed under reduction, the said William Hamilton Ritchie derived no interest

June 29, 1827. **Mrs Noble's trustees and others appealed.**

Appellants.—Mrs Noble's capacity to dispose of her estate and effects, has been established by a verdict of a Jury. The deeds prove that instructions to draw them were given; and the respondents did not prove that no instructions were given for that purpose. It is immaterial whether she was in such a state of mind as not to be able to judge correctly with regard to the effect of her deeds, as depriving her of all power of revoking or altering the same. That is a matter quite distinct from the capacity to will and dispose of her estate and effects after death, which capacity she is proved to have possessed. The verdict, finding these deeds 'were not the free and voluntary acts of 'Mrs Noble, but that there is not sufficient evidence to show 'that they were obtained by the undue influence of the de-'fender,' is not only inconsistent with the previous verdict, that she was capable of willing and disposing of her estate and effects, but is so also with itself; it being proved that the deeds were not obtained by undue influence, and yet it is found they were not Mrs Noble's deeds, although she was capable of making them. The respondents took issues as to particular allegations, which not having been proved affirmatively, the result to the appellants is the same as if the Jury had found negatively these points. Indeed the respondents being pursuers, any inconsistency or contradiction in the verdicts must be fatal to their plea. As to signing by notaries, it is sufficient that Mrs Noble felt the defect of her sight, and desired the notaries to sign. The respondents cannot be permitted to falsify the subscription, unless they at the same time prove no authority given the notaries to sign; but the Jury have found that she gave the notaries instructions to sign in her behalf.

Respondents.—The incapacity of Mrs Noble to understand these deeds—and that these deeds were not her free and volun-

---

'whatever under that trust-deed, and has not been left any legacy or other provision 'by the said deed. 2dly, That Mr Hamilton Ritchie has been called as a defender in 'this case, merely to deprive the defenders of the benefit of his evidence, and that he 'cannot be made personally responsible for the costs of suit. 3dly, And that there 'being necessarily, from the very nature of the case, a penuria testium, Mr Hamilton 'Ritchie is a necessary witness, and admissible as such by the law of Scotland, although 'he is the nephew of one of the defenders.' This bill of exceptions was disallowed; and against this judgment, as well as one refusing a new trial, the appellants entered an appeal, but the respondents having presented a petition in regard to the competency of the appeal as to those judgments, the appellants withdrew it.

tary acts—being established by a verdict of a Jury, the deeds cannot be supported. They are not her deeds; and that puts the inquiry at rest. But these deeds were irregularly executed, and ought to bear no faith in judgment, not having been subscribed by Mrs Noble herself, and the reason assigned by the notaries, in their doquet, having been proved to be false. June 29, 1827.

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutor complained of affirmed.

Appellants' Authorities.—Bell on Testing Deeds, p. 174. Robertson, Feb. 4, and Nov. 3, 1742. (15943.) Scott, Nov. 17, 1789. (4946.)
Respondents' Authorities.—Bell on Testing Deeds, p. 207. 55 Geo. III. c. 42, c. 8. Gillespie, Feb. 11, 1817. (F. C.)

MONCRIEFF and WEBSTER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

INDEX OF NAMES

TO

VOLUME II.

Appellants.	*Respondents.*	No.	Page.
Advocate, Lord	Hopetoun, Earl of	58	644
Arbuckle, Hugh	Innes, Campbell	38	528
Auld, Rev. Dr	Magistrates of Ayr, and Others	52	600
Balmanno, Dr	M'Nee, D.	2	7
Bryce, James	Graham, Walter	36	481
Buchanan, D. C.	Morrice and Others	16	143
Budge and Others	Magistrates of Edinburgh	49	588
Campbell, Rivers and Co.	Beath, D.	5	25
Campbell, J.	Steel and Lang	27	334
Campbell, Sir J.	Sassen and M'Kenzie	26	309
Clayton and Others	Lowthian, (R.) Ross, & Others	6	40
Cooper, A.	Hamilton, A.	8	59
Craigie, Charles	Mill, J.	57	642
Craufuird, A.	Torrance and Husband	32	429
Craufurd, Lady M. L.	Dixon, J. and T.	29	354
Craufurd, Lady M. L.	Campbell, Colonel W. C.	33	440
Crawford, Stephen Rowan	Bennet, William	53	608
Crawford, William	M'Cormick and Husband	45	569
Dick, John	Donald and Cuthbertson	37	522
Duff, Sir J.	Fife, Earl of	19	166
Ewing, A. and Others	Lawrie, W.	3	19
Ewing, A.	Gilchrist, H.	4	22
Ferrier and White	Berry and Trustee	12	93
French, E. W. or Hay	Marshall, J.	10	71
Fleming, Bowman	Thomson, John	24	277
Gardner, James, and Others	Reekie, James, and Others	39	531
Gibson, John, and Others	Watson, Mrs, and Others	59	648
Glasgow, Magistrates of, &c.	Dawsons and Mitchell	21	230
Gordon, Lieut.-Col. J.	Robertson, J. and Others	15	115
Heriot's Hospital, Governors of	Cockburn and Others	25	293
Hill and Others	Burns and Others	11	80
Innes, James Rose	Earl of Fife, James	56	637

Appellants.	*Respondents.*	No.	Page.
Lang, John	Struthers and Others	43	563
Lawsons, J. and C.	Stewarts and Others	55	625
Low, Robert	Bell, Henry	47	579
Low, Robert	Duncan, Patrick	48	583
M'Braire, J.	Hamilton, G. and W.	9	66
M'Callum, A.	Robertson, W.	28	344
M'Donell, A. R.	Cameron, Wm., and Others	50	592
M'Donell, A. R.	Cameron, Wm., and Others	51	595
M'Kenzie, M.	Sutherland, G.	18	158
M'Lean, Mary	Murdoch, Alexander	44	568
Maule, W.	Maule, Hon. W. R.	34	451
Miller, J.	Gwydir, Lord and Lady	7	52
Moore, Rev. Robert	Belches, A. H. M.	42	558
Napier and Crombie	Scott, W. G. and Others	41	550
Officers of State	Haddington, Earl of	35	468
Ogilvie, S. T.	Dundas, Lindsay, and Others	20	214
Queensberry's, Duke of, Trustees	Queensberry, Marquis of	23	265
Robinson, G.	Edgars and Lyon	14	106
Stair, Earl of	Stair's Trustees	31	414
Stair, Earl of	Stair's Trustees	54	614
Stewart, Sir M. S.	Porterfield, J. C.	30	369
Spier, R.	Dunlop, J.	22	253
Struthers, A. and Others	Barr, J.	17	153
Strathmore, Earl of, &c.	Laing, W.	1	1
Taylor, W.	Fairlie, Sir W. C. & G. Taylor	13	101
Tod, John, and Others	Tod, James, and Others	40	542
Wyllie, James	Ross, E. and Others	46	576

Respondents.	*Appellants.*	No.	Page.
Barr, J.	Struthers, A. and Others	17	153
Belches, A. H. M.	Moore, Rev. Robert	42	558
Bell, Henry	Low, Robert	47	579
Beath, D.	Campbell, Rivers and Co.	5	25
Bennet, William	Crawford, Stephen Rowan	53	608
Berry and Trustee	Ferrier and White	12	93
Burns and Others	Hill and Others	11	80
Campbell, Colonel W. C.	Craufurd, Lady M. L.	33	440
Cameron, W. and Others	M'Donell, A. R.	50	592
Cameron, W. and Others	M'Donell, A. R.	51	595
Cockburn and Others	Heriot's Hospital, Governors of	25	293
Dawsons and Mitchell	Glasgow, Magistrates of, &c.	21	290
Dixon, J. and T.	Craufurd, Lady M. L.	29	354
Donald and Cuthbertson	Dick, John	37	522
Duncan, Patrick	Low, Robert	48	583
Dundas, Lindsay, and Others	Ogilvie, S. T.	20	214
Dunlop, J.	Spier, R.	22	253
Edgars and Lyon	Robinson, G.	14	106
Fairlie, Sir W. C. & G. Taylor	Taylor, W.	13	101
Fife, Earl of	Duff, Sir J.	19	166
Fife, Earl of	Innes, James Rose	56	637
Gilchrist, H.	Ewing, A.	4	22
Graham, Walter	Bryce, James	36	481
Gwydir, Lord and Lady	Miller, J.	7	52
Haddington, Earl of	Officers of State	35	468
Hamilton, A.	Cooper, A.	8	59
Hamilton, G. and W.	M'Braire, J.	9	66
Hopetoun, Earl of, and Others	Lord Advocate	58	644
Innes, Campbell	Arbuckle, Hugh	38	528
Laing, W.	Strathmore, Earl of, &c.	1	1
Lawrie, W.	Ewing, A. and Others	3	19
Lowthian, (R.) Ross, & Others	Clayton and Others	6	40
M'Cormick and Husband	Crawford, William	45	569
Magistrates of Edinburgh	Budge and Others	49	588
Magistrates of Ayr, and Others	Auld, Rev. Dr	52	600
Marshall, J.	French, E. W. or Hay, &c.	10	71
Maule, Hon. W. R.	Maule, W.	34	451
Mill, J.	Craigie, Charles	57	642
M'Nee, D.	Balmanno, Dr.	2	7

Respondents.	*Appellants.*	No.	Page.
Morrice and Others	Buchanan, D. C.	16	143
Murdoch, Alexander	M'Lean, Mary	44	568
Porterfield, J. C.	Stewart, Sir M. S.	30	369
Queensberry, Marquis of	Queensberry's, Duke of, Trustees	23	265
Reekie, James, and Others	Gardner, James, and Others	39	531
Robertson, J. and Others	Gordon, Lieut.-Col. J.	15	115
Robertson, W.	M'Callum, A.	28	344
Ross, Elizabeth, and Others	Wyllie, James	46	576
Sassen and M'Kenzie	Campbell, Sir J.	26	309
Scott, W. G. and Others	Napier and Crombie	41	550
Stair's Trustees	Stair, Earl of	54	614
Stair's Trustees	Stair, Earl of	31	414
Steele and Lang	Campbell, J.	27	334
Stewarts and Others	Lawsons, J. and C.	55	625
Struthers and Others	Lang, John	43	563
Sutherland, G.	M'Kenzie, M.	18	158
Thomson, John	Fleming, Bowman	24	277
Tod, James, and Others	Tod, John, and Others	40	542
Torrance and Husband	Craufuird, A.	32	429
Watson, Mrs, and Others	Gibson, John, and Others	59	648

ERRATA.

Page 4. line 22, *for* of *read* by.
42. line 27, *for* in *read* up.
45. line 35, insert *so* before *much*.
47. line 23, insert *a* before *debt*.
102. line 10 from foot, *for* yearly *read* early, and delete comma.
104. line 8 from foot, delete †, and place it at the word "appealed," four lines above.
105. line 14, *for* respondent *read* appellant.
116. line 3, *for* Robertson *read* Anderson.
267. line 23, *for* was *read* were.
313. line 5, *for* is *read* are.
345. line 16, *for* of *read* to.
386. line 40, *for* is *read* are.
399. line 11, *for* disponee *read* disponer.
472. line 36, *for* longer *read* longest.

INDEX OF MATTERS

TO

VOLUME II.

ADVOCATION.—See *Landlord and Tenant.*

AGENT AND CLIENT.—See *Reparation.*

——————————— See *Mandate.*

ALIMENT.—See *Husband and Wife.*

APPEAL.—Appeal entertained, and costs awarded, on affirming the judgments complained of, where the interest of the appellant amounted to twenty-four shillings, and L. 30. 5s. 8d. being expenses of process, and where doubts were entertained as to the soundness of part of the judgments, the appellant having limited his appeal to the part affirmed.—No. 8. p. 59.

——————Respondents in an appeal having failed to lodge answers to the petition of appeal, and also their Cases, in due time; and the cause being appointed for hearing ex parte; not entitled to be heard at the bar; but the case delayed on their paying the costs of the day.—No. 13. p. 104. Note.

BANKRUPT.—Held, (affirming the judgment of the Court of Session), in a petition and complaint by creditors against a trustee on a sequestrated estate, praying for his removal, That although he had committed some irregularities, yet they were not such as to warrant his removal; and as the other accusations against him were not well-founded, he was entitled to his expenses, subject to modification.—No. 3. p. 19.

——————Judgment, discharging a bankrupt under the Act 54. Geo. III. c. 137. and repelling various objections to the discharge being granted.—No. 4. p. 22.

——————Held, (affirming the judgment of the Court of Session), 1. That an affidavit emitted in relation to a claim on a sequestrated estate, by a bankrupt under sequestration, and not by his trustee, is irregular; and, 2. That after a claim has been rejected, and no complaint made in due time, the party claiming has no right to object to a composition agreed to by the other creditors, but is only entitled to a composition in the event of establishing that a debt is due to him.—No. 12. p. 98.

——————A Jury having found, that, within sixty days of an admitted bankruptcy, the indorsee of a bill accepted by a bankrupt did not enter into an agreement or concert with the bankrupt for the purpose of obtaining security and payment of the bill; but that

the indorsee, by means of the sale of the bankrupt's heritage, did within the 60 days obtain from him a sum of money as provision for payment of the bill when it became due; and the Court of Session having held this transaction not to be reducible under the Act 1696;—The House of Lords remitted this latter point for reconsideration.—No. 22. p. 253.*

———A party having drawn two bills on another, and discounted them with a bank; and the bills having been dishonoured by non-acceptance; and the drawer having, within sixty days of his bankruptcy, drawn a bill on his son for the amount of the dishonoured bills, which he accepted on receiving an heritable security in relief; and this bill having been indorsed to the bank by the drawer, and he having been sequestrated;—Held (affirming the judgment of the Court of Session), That the indorsation to the bank was reducible under the Act 1696, c. 5., but reversing the judgment so far as it imported that the bill was to be delivered up by the bank to the trustee for the creditors of the bankrupt.—No. 47. p. 579.

Bill of Exceptions.—Question raised and considered as to what is the proper subject and shape of a bill of exceptions, and what amounts to a direction of the Judge, or only an expression of opinion or mere obiter dictum.—No. 19. p. 166.

———See *Prisoner*.

Bill of Exchange.—Circumstances under which, in a question with the payees of a promissory-note, it was held, (affirming the judgment of the Court of Session), That one of the two granters, who alleged he was merely a cautioner, was not released.—No. 14. p. 106.

Burgh Royal.—The Court of Session having found that certain lands, situated within the territory of the royal burgh of Glasgow, which had been disponed by the magistrates in feu-farm, for payment of a feu-duty, but to be held burgage, and of which the titles had been made as if held feu, were to be considered as holding feu; and that grain imported within their bounds was not liable to certain burgh dues, called ladle-dues; and that a clause of thirlage did not apply to invecta et illata;—The House of Lords remitted the case for the opinion of all the Judges.—No. 21. p. 220.†

———The Court of Session having found that there was not sufficient usage established to modify the written set of a royal burgh,—The House of Lords remitted to make further inquiries.—No. 39. p. 531.‡

———Held, 1. (affirming the judgment of the Court of Session), That it is not competent to raise an action of reduction of an election of magistrates of a royal burgh, made in virtue of a royal warrant, after the expiration of two months from the date of election; 2. (reversing the judgment), That as the statute 16. Geo. II. c. 11. ordains costs to be given to the successful party, the defenders resisting the reduction ought to have got expenses; and, 3. That an appeal in regard to these expenses was competent.—No. 40. p. 542.

———See *Mandate*.

* See result of the remit, 5. Shaw and Dunlop, No. 344. p. 789.

† See for the result of the remit, 6. Shaw and Dunlop, No. 6. p. 19.

‡ See subsequent procedure, 6. Shaw and Dunlop, No. 249. p. 693.

infeft only a me, on which sasine was taken; and having got also bills by cautioners in corroboration of, but without prejudice to the heritable security; and it being stipulated that the creditor should convey the property to the cautioners, in the event of their being obliged to pay the debt; and the creditor having neglected to get a confirmation of the sasine, whereby the property was carried off by another party;—Held, (reversing the judgment of the Court of Session), That one of the cautioners, who was sued for payment of his bill, was by this neglect discharged.—No. 24. p. 277.

CLAUSE.—See *King's Park—Landlord and Tenant.*

COAL.—See *Landlord and Tenant.*

COMPETITION.—See *Right in Security—Fee and Liferent.*

CONDITIONAL INSTITUTE.—See *Legacy.*

COSTS.—See *Appeal—Bankrupt.*

DISCHARGE.—See *General Discharge—Bankrupt.*

EDINBURGH.—See *Stat. 25. Geo. III. c. 28.*

ENTAIL.—The Court of Session having held that an action concluding for damages at the instance of an heir of entail in possession, was competent against the executors of the preceding heir, who possessed under an unrecorded entail in favour of a series of substitutes, containing prohibitory, irritant, and resolutive clauses; and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail being the heir's forfeiture, and nullity of the act itself, and not pecuniary damages; —The House of Lords remitted for the opinion of both Divisions.—No. 23. p. 265.*

——— A party having executed a deed of entail in favour of an institute, and the heirs-male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs-male and female of his and the entailer's body; and thereafter having made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution heredibus nominandis; and the estates having been possessed for more than forty years on the entail alone, without reference to the deed of nomination; the Court of Session held, that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. But the House of Lords remitted for the opinion of both Divisions.—No. 30. p. 369.†

———See *Stat. 10. Geo. III. c. 51.*

EXHIBITION.—Held, (reversing the judgment of the Court of Session), That a party who had been served heir of provision under a charter conveying lands and the dignity of a peerage, but whose right to the peerage had not been ascertained or recognized by the Crown, was not entitled to insist in an action against another party, having

---

* See result of remit, 6. Shaw and Dunlop, No. 253. p. 706.

† This case is still (February 1829) under consideration, but is expected to be immediately decided.

EXHIBITION continued.
right to the lands, concluding for exhibition and delivery of all titles relative to the peerage as his own proper writs.—No. 33. p. 440.
EXPENSES.—See *Entail—Burgh Royal.*
FACILITY.—See *Reduction.*
FACULTY.—See *Entail.*
FEE AND LIFERENT.—A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be liferented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive), and the price not having been paid;—Held, (affirming the judgment of the Court of Session), 1. That the fee belonged to the children, and not to their parents; and, 2. That they were preferable on the price to the heirs ab intestato of the seller.—No. 41. p. 550.
FEU.—See *Burgh Royal.*
FREEHOLD QUALIFICATION.—See *Sasine.*
GENERAL DISCHARGE.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That an agreement between partners in trade relative to company matters, 'to grant 'full and competent discharges to each other, in full of all bonds, '&c. as individuals or partners,' did not embrace a bond by one of the partners to another, relating to a private transaction between themselves.—No. 45. p. 569.
GLEBE.—A Presbytery having designed, under the statute 1663, c. 21. to the minister of the parish a grass glebe, out of kirk lands belonging to one of the heritors, whose mansion-house had formerly been built on them; and the Court of Session (altering the judgment of the Lord Ordinary) having found that the heritor was entitled to object to those lands being so designed, and that the minister was bound to accept a glebe out of other lands, which were not kirk lands, but which were alleged to be equally as good and convenient as those designed by the Presbytery; and that he was not entitled to a compensation for the want of a glebe during the litigation;—Held, (reversing the judgment of the Court, but affirming that of the Lord Ordinary), That the minister was entitled to have the glebe designed out of the kirk lands, and to a compensation for the want of it.—No. 42. p. 558.
HEIR AND EXECUTOR.—A purchaser of an estate over which there was an heritable debt, having bound himself to pay it as part of the price, and received a discharge of the price on that footing; and having granted a personal bond of corroboration to the creditor;—Held, (affirming the judgment of the Court of Session), in a question between the heir and executor of the purchaser, that the debt was heritable, and formed a burden on the heir.—No. 6. p. 40.
——————See *Right in Security.*
HUSBAND AND WIFE.—Held, (reversing the judgment of the Court of Session), 1. That a woman having failed to establish a marriage,—which she alleged was constituted by certain written documents, in which she was recognized as the defender's wife,—was not entitled to found on them to the effect of obtaining a permanent aliment during her life, she being fully aware that they had been given not intuitu matrimonii, but for another purpose, and not alleging that she had been seduced; and, 2. That it is

incompetent to award interim aliment in a declarator of marriage resting on the mere allegation of the pursuer, and while no evidence of the marriage has been produced.—No. 26. p. 309.

———————See *Sale.*

IDIOTRY AND FURIOSITY.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, having refused to recall the appointment, and repelled an objection that his fatuity could only be ascertained by the verdict of a Jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords remitted to review the judgments on the merits, reserving the question of expenses.—No. 36. p. 481.*

IMPLIED WILL.—See *Testament.*

INDEFINITE PAYMENT.—See *Prisoner.*

INTEREST.—See *Trust.*

JURISDICTION.—A party, who was the owner of a hackney-coach, having been convicted under the statutes relative to the post-horse duties by a Justice of the Peace; and it being provided, that any party aggrieved 'shall and may, upon finding security for the penalties and costs, appeal to the Justices of the Peace at the next 'Quarter-sessions;' and the party having, instead of so appealing, presented a bill of suspension to the Court of Session, on alleged informalities, and excess of jurisdiction;—Held ex parte, (affirming the judgment of the Court of Session), That the bill was incompetent.—No. 57. p. 642.

———————See *Exhibition.*

JURY COURT.—See *Landlord and Tenant.*

KING'S PARK.—Held, (affirming the judgment of the Court of Session), That a charter, granting the office of Keeper of the King's Park, did not confer any feudal right to the property of it, although it was alleged that acts of proprietorship had been exercised by the Keeper for more than forty years; but a remit made to review and take the opinion of the other Division of the Court, as to whether the Keeper of the Park be entitled, under the terms of the grant and alleged possession for more than forty years, to work quarries in the Park?—No. 35. p. 468.

LANDLORD AND TENANT.—A tenant having entered to possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years; and not having complied with the rules so prescribed;—Held, (affirming the judgment of the Court of Session), That he was liable in the penal rent, and that it was not a valid defence that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord.—No. 7. p. 52.

———————— A lease having been granted to three tenants, excluding assignees, and two of the tenants having, without consent of the landlord, assigned their interests to the other

---

* See the result of the remit, G. Shaw and Dunlop, No. 148. p. 425. and post. vol. iii. p. 323.

LANDLORD AND TENANT continued.

tenant, who obtained possession, and was thereafter deprived of it; —Held, (affirming the judgment of the Court of Session), That he was not entitled to maintain an action against the landlord demanding repossession, as being the only person entitled to possession.—No. 13. p. 101.

——————Held, (reversing the judgment of the Court of Session), That a clause in articles and conditions relative to a lease regulating the management of a farm, bearing, that 'the 'whole fodder to be used upon the ground, and none sold or car-'ried away at any time, hay only excepted, and all the dung to be 'laid on the farm the last year of the lease,' created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the way-going crop.—No. 15. p. 115.*

——————A lease of all the coals within certain lands having been granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands; and power being given to the tenants to erect engines on pits, to draw the water from the coal on any of the adjoining lands of which the tenants might happen to be proprietors or lessees; and the tenants having worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal-field so let to them; and an action having been brought after the lapse of twenty years from the termination of the lease, concluding that the tenant should be ordained to draw off the water, and erect a barrier, failing which, to pay damages;—Held, (affirming the judgment of the Court of Session), 1. That the tenants were not bound to leave a barrier; and, 2. That the alternative conclusion for damages did not render a remit to the Jury Court imperative.—No. 29. p. 354.

——————Circumstances in which it was held, (affirming the judgment of the Court of Session), That a tenant of a sheep farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed.—No. 50. p. 592.

——————A landlord having raised a process of sequestration against a tenant, and the Sheriff having found a certain sum of rent due, for which he decerned; and another, for which, if not paid, warrant of sale would be issued; but no final judgment having been pronounced, and the tenant having brought a process of advocation ob contingentiam of a declarator which he had raised, but not executed; and the Court of Session having advocated the cause, 'sustained the reasons of advocation, and assoilzied from the 'conclusions of the process;' and the landlord having contended in the House of Lords, that as the only 'reason of advocation' was the alleged contingency with the declarator, and as no such action had then been in Court, the advocation ought to be dismissed;—The House of Lords affirmed the judgment of the Court of Session, in so far as it advocated the cause, sustained the reasons of advocation, and assoilzied from the conclusions of the process; but remitted, with instructions to remit to the Sheriff to proceed in terms of his interlocutor.—No. 51. p. 595.†

* In the report, p. 116. line 3. for Robertson read Anderson.

† See 6. Shaw and Dunlop, No. 21. p. 85.

LEGACY.—A husband and wife having disponed, by a trust-settlement, their estates and effects to themselves jointly, for their joint and several liferents allenarly, and to trustees in fee, declaring the settlement irrevocable at the death of either; and bequeathed certain legacies, declaring, that 'in the event of the death of any of the said 'legatees prior to the survivor of us, his, her, or their legacy or le-'gacies shall thereby fall and belong to their executors, or next of 'kin;' and a legatee having survived one of the testators, but predeceased the other;—Held, (affirming the judgment of the Court of Session), That the legacy belonged to the legatee's nearest of kin as conditional institutes.—No. 55. p. 625.

———See *Trust*.

MANDATE.—Held, that a company having employed agents to freight vessels, who accordingly did so in their own name, and the company having failed to implement the charter-party, was liable to relieve these parties from damages awarded against them for non-implement.—No. 9. p. 66.

———A constituent member of a Town-Council, present at an election of Magistrates, having gone abroad; and a petition and complaint having thereafter, within the statutory period, been presented in his name; and it being alleged that he had granted no mandate authorizing this to be done, and no mandate having been produced;—Held, (affirming the judgment of the Court of Session), That the complaint at his instance was incompetent.—No. 38. p. 528.

———Held ex parte, (affirming the judgment of the Court of Session), in an action at the instance of a law-agent for payment of his account, that a mandate alleged, but denied, to be signed by the client's mark, together with other circumstances inferring employment, was sufficient to entitle him to decree against the client.—No. 44. p. 568.

MANSE.—Found, (reversing the judgment of the Court of Session), That the minister of a royal burgh, with a landward parish annexed, is entitled to a manse under the statute 1663, c. 21.—No. 52. p. 600.*

MEMBER OF PARLIAMENT.—See *Sasine*.

MINOR.—A minor, in trade, having given a receipt for L. 3000 sterling, but which was not a trade transaction; and having been found liable in repetition for the whole amount, although he alleged that truly he had not received L. 3000 sterling, but only certain items and orders, some of which had been paid, and others not;—The House of Lords (reversing the judgment of the Court of Session, except as to an admitted sum) ordered an inquiry as to the amount de facto received, or what might, without the party's wilful default, have been received, in respect of the receipt.—No. 53. p. 608.

MORTIFICATION.—See *Testament*.

MUTUAL CONTRACT.—See *Partnership*.

NOVATION.—See *Bill of Exchange*.

OATH.—See *Triennial Prescription*.

PALACE—See *Royal Palace*.

PARTNERSHIP.—Circumstances under which it was held, (reversing the judgment of the Court of Session), That a partner in a joint adventure, (the terms of which were arranged by a written con-

* See 6. Shaw and Dunlop, No. 420. p. 1087.

PARTNERSHIP continued.
tract), had no right to recompense for personal trouble connected with the adventure, for which no stipulation had been made, but which it was alleged was casus improvisus; nor to indemnity for the adventure having been put an end to as ruinous.—No. 5. p. 25.
———Circumstances in which it was held, (affirming the judgment of the Court of Session), That certain shipments of goods to the Continent of Europe, during the war between France and Britain, made by an individual partner of a company, who was a citizen of America, belonged to him exclusively, and that his partner, who was a subject of Britain, had no claim to them, in consequence of letters written by him disclaiming all connexion with the goods, although he alleged that these letters were written to deceive the enemy.—No. 16. p. 143.
———Circumstances in which it was held ex parte, (reversing the judgment of the Court of Session), That the extent of the interest of a partner in a company, where this was not fixed by contract, was not to be regulated by the amount of his input stock, as compared with that of the other partners, but that he was to be held as having an equal share.—No. 17. p. 153.
———See *Process—Mandate.*
PASSIVE TITLE.—A testator having, by a deed of settlement, conveyed his property and effects to a party who was not the heir-at-law, under burden of payment of legacies; and the heir-at-law (who was the disponee's mother) having made up titles to the testator, and thereafter executed a gratuitous disposition in favour of the disponee, who in the mean time had intromitted with the funds of the testator;—Held, (affirming the judgment of the Court of Session), That the disponee was liable in payment of the legacies, although he alleged that his right was derived from the heir-at-law, and not from the testator.—No. 46. p. 576.
PAYMENT INDEFINITE.—See *Prisoner.*
PEERAGE.—See *Exhibition.*
PENAL RENT.—See *Landlord and Tenant.*
PERSONAL EXCEPTION.—See *Husband and Wife.*
POINDING.—See *Right in Security—Royal Palace.*
POSSESSORY JUDGMENT.—Two opposite heritors on the banks of a river, having each right to one-half of the salmon fishing, and having exercised it for more than seven years by one and the same tenant;—Held, (affirming the judgment of the Court of Session), That a tenant who had so enjoyed that possession by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one-half share to another tenant.—No. 18. p. 158.
PRESCRIPTION.—See *Triennial—Entail—King's Park.*
PRINCIPAL AND AGENT.—See *Mandate.*
PRISONER.—A creditor having drawn a dividend from the sequestrated estate of his debtor upon the sum-total of a debt payable by four instalments, of which the two last were not yet due;—Held, (reversing the judgment of the Court of Session), that the dividend was not imputable towards the total extinction of the first and second instalments, but was to be considered as a payment of so much on each pound of the whole debt.—No. 2. p. 7.
PRIVILEGE.—See *Statute.*
PROCESS.—Question raised and considered as to what is the proper

PROCESS continued.
subject and shape of a bill of exceptions, and what amounts to a direction by the Judge, or only an expression of opinion, or mere obiter dictum?—No. 19. p. 166.
——Held, (affirming the judgment of the Court of Session), That a defender who was sued as the surviving partner of a company was not entitled to object that the representatives of a deceased partner were not called, seeing that he declined to state who or where they were.—No. 9. p. 66.
——Held, that a decree which awarded a sum of sterling money, where the summons concluded for Halifax currency, was quoad hoc ultra petita, and a remit made to correct it accordingly. —No. 9. p. 66.
——See *Appeal—Bill of Exceptions.*
——See *Landlord and Tenant.*
PUBLIC BURDEN.—See *Statute.*
RECOMPENSE.—See *Partnership.*
REDUCTION.—Held, (affirming the judgment of the Court of Session), That a deed of settlement was not effectual, which had been executed by a party who was found by the verdict of a jury to be capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revoking or altering it, and as not being her free and voluntary act, although not obtained by the undue influence of the parties in whose favour it was granted.—No. 59. p. 648.
REPARATION.—Held, (affirming the judgment of the Court of Session), That a law agent is liable for loss arising from an heritable security being ineffectually completed, although drawn on the employment of the granter of the deed, and not of the lender of the money.—No. 43. p. 563.
——See *Taillie—Stat. 59. Geo. III.—Tack—Landlord and Tenant.*
RES JUDICATA.—Circumstances in which it was held, (reversing the judgment of the Court of Session), That a decree of the House of Lords did not form a res judicata as to a claim for certain leases;* but affirming the judgment, in hoc statu, as to a claim to certain lands which had been found by an extracted decree to belong to the defender.—No. 34. p. 451.
RETENTION.—See *Superior and Vassal.*
RIGHT IN SECURITY.—Held, (affirming the judgment of the Court of Session), That the holders of heritable bonds, who had not used poinding of the ground, had no preference over the proceeds of the moveables found on the ground, in a question with personal creditors claiming under a sequestration of the estates of the proprietor. —No. 10. p. 71.
—— A husband, possessed of property in Jamaica, having, by marriage articles, bound himself to secure to his wife, in case of her surviving him, an annuity of L. 400, payable out of his Jamaica estates; and binding himself, in the event of purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuity; and having

* This case is still (February 1829) under the consideration of the Court of Session.

RIGHT IN SECURITY continued.
bought lands in Scotland, but having taken the titles to himself and his heirs alone, and having died;—Held, (reversing the judgment of the Court of Session), 1. That the annuity constituted a proper burden on the Jamaica estate, and not on the Scotch estate; and, 2. That a party taking the former under a testamentary deed, had no relief against the heir succeeding to the estate in Scotland.—No. 20. p. 214.

ROYAL PALACE.—Held ex parte, (reversing the judgment of the Court of Session), That the privilege of Royal Palace protects against poinding and letters of open doors within the precincts of the Palace of Holyroodhouse, although his Majesty be not residing there when the diligence is attempted to be executed, the Palace being kept up as a place of royal residence.—No. 1. p. 1.

SALE.—A party having purchased a property, and taken the title in the name of his wife, and thereafter become bankrupt, and fled the country; and his wife having, in his absence, conveyed the property to the trustee for his creditors, who exposed it to sale, under articles of roup, by which he bound himself to execute and deliver to the purchaser a valid irredeemable disposition; and the purchaser having objected that the title granted by the wife was inept, and refused to pay the price; and the Court of Session having found that the trustee was not bound, at the expense of the bankrupt estate, to make any addition to the title, but only at the purchaser's expense;—Held, (reversing the judgment), That the trustee was bound to give the purchaser a good and valid title, and that the one which he offered was not good.—No. 37. p. 522.

——— See *Trust*.

SALMON FISHING.—See *Possessory Judgment*.

SASINE.—Held ex parte, (affirming the judgment of the Court of Session), in a question relative to a freehold qualification, that part of the name of one of the parcels of land enumerated in the sasine founded on having been written throughout the instrument on erasures, the sasine was not sufficient to establish the qualification.—No. 56. p. 637.

SEQUESTRATION.—See *Bankrupt*.

SERVITUDE.—See *Superior and Vassal*.

SET.—See *Burgh Royal*.

SOCIETY.—See *Partnership*.

STATUTE 25. GEO. III. c. 28.—Held, (reversing the judgment of the Court of Session), 1. That the accounts of expenditure by an heir of entail under the statute 10. Geo. III. c. 51. must specify the particulars, and not state merely the sum-total expended. 2. That the vouchers or receipts must be granted by the party performing the operations, and not by tenants who have been authorised to get them done, or had right to them by their leases. 3. That a notice given in 1810, and operations performed under it in that year, and thereafter in 1816, and when intervening notices as to other parts of the estate had been made, was not sufficient to authorize improvements in 1816. And, 4. That it is incompetent to award expenses in an action of declarator, under the above statute.—No. 32. p. 429.

———Found, (affirming the judgment of the Court of Session), That, under this statute, the Magistrates of Edinburgh have right to levy impost duty from all vintners and tavern-keepers within

STATUTE 25. GEO. III. c. 28. continued.
their bounds, on all foreign wines and other liquors specified in the Act consumed within the taverns, whether the vintners themselves imported those liquors, or purchased them from other importers who had not paid the duty; but that if the Magistrates so levy the duty, they cannot assess the tavern-keepers in the commutation tax, in respect of the taverns where the liquors are sold and consumed.—No. 49. p. 588.
———Found, (affirming the judgment of the Court of Exchequer), That the lead and ore raised from the mines of Waterhead, &c. belonging to the Earl of Hopetoun, are only liable in the ad valorem duties of 10s., and of L. 1 for every L. 100 exported, in terms of the statutes imposing the same, but are exempt from all other duties.—No. 48. p. 644.
——— 10. GEO. III. c. 51.—See *Entail.*
——— 1669, c. 21.—See *Grass Glebe.*
——— 1669, c. 21.—See *Manse.*
——— 1681, c. 5.—No. 19. p. 166.—See *Writ.*
——— 1696, c. 5.—See *Bankrupt.*
——— 1696, c. 5.—No. 22. p. 253. See *Bankrupt.*
——— 16. GEO. II. c. 11.—*See Royal Burgh.*
——— 54. GEO. III. c. 137.—See *Bankrupt.*
——— 59. GEO. III. c. 35.—See *Landlord and Tenant.*
——— 4. GEO. IV. c. 26.—and 25. GEO. III. c. 51.—See *Jurisdiction.*
SUBMISSION.—A submission having been made to three arbiters, and in case of their differing in opinion, to any two of them, of all claims which the parties submitting had against each other for the proportions of profit and loss which they ought to have borne for a particular year, arising out of the transactions of a company of which they were partners, and with power to the arbiters to ascertain whether there had been any error in the books of the company; and a decree having been pronounced by two of them (without previously issuing notes) on the narrative that the other had differed in opinion; and having, without investigating the books, found one of the parties liable in a certain sum, as the loss corresponding to a certain share;—Held, (affirming the judgment of the Court of Session), 1st, That the decree was valid, although signed by the two arbiters only, and although there was no evidence under the hand of the third arbiter that he had differed; 2d, That the questions submitted were exhausted; and, 3d, That the failure to issue notes was no objection to the decree.—No. 28. p. 344.
SUBSTITUTE OR CONDITIONAL INSTITUTE.—See *Legacy.*
SUPERIOR AND VASSAL.—Held ex parte, (reversing the judgment of the Court of Session), That a vassal in an urban tenement is not entitled to retain his feu-duties, on the allegation that the superior has bestowed on him a servitude altius non tollendi over houses on the opposite side of the street, which had been violated; the vassal having been found to have right to enforce that servitude by having the houses reduced in height.—No. 25. p. 293.
———See *Trust.*
SUSPENSION.—See *Jurisdiction.*
TACK.—See *Landlord and Tenant.*
TESTAMENT.—Held, (affirming the judgment of the Court of Session), in a question with the next of kin, that a bequest to trustees was valid, whereby a testatrix appointed 'the residue of her estate, to

'be applied by my said trustees, and their foresaids, in aid of the 'institutions for charitable and benevolent purposes established, 'or to be established, in the city of Glasgow or neighbourhood 'thereof; and that in such way and manner, and in such proportions 'of the principal or capital, or of the interest or annual proceeds 'of the sums, &c. to be appropriated, as to my said trustees, and 'their foresaids, shall seem proper; declaring, as I hereby expressly 'provide and declare, that they shall be the sole judges of the 'appropriation of said residue for the purposes aforesaid.'—No. 11. p. 80.

———See *Trust*.

THIRLAGE.—See *Burgh Royal*.

TITLE TO PURSUE.—A party having accepted a bill for the accommodation of the drawer, from whom he received an heritable security in relief; and the bill having been indorsed to the cashier of a bank in payment of a debt due by the drawer; and the indorsation having been reduced at the instance of the trustee for the creditors of the drawer on the Act 1696, c. 5. reserving the rights of the bank against the acceptor; and the cashier of the bank having brought an action on the bill against the acceptor before an Inferior Court, which was advocated ob contingentiam of a reduction of the heritable security; and the Court of Session having sustained the reasons of advocation, and found that the bank had no *right to* sue on the bill; and the heritable security having been reduced;—Held, (affirming the judgment, so far as it sustained the reasons of advocation, but reversing it, so far as it found that the bank could not sue on the bill), That as there was no evidence that the bank was participant in the granting to the acceptor of the heritable security, they, and their cashier for their use, were entitled to maintain an action for payment of the bill against the acceptor.—No. 48. p. 583.

———See *Exhibition*.

TRIENNIAL PRESCRIPTION.—Held, (affirming the judgment of the Court of Session), That a party having, on a reference to oath, deponed that he believed a prescribed account had been paid by his factor, and was certain it was paid from having settled accounts with him; and these accounts not showing such payment, this was sufficient to elide the triennial prescription.—No. 8. p. 59.

TRUST.—A party having, by missive, feued a piece of building-ground in his own name, and thereafter alleging that he had done so on behalf of a married woman, to whom he desired the feu-charter to be granted in liferent, excluding her husband's jus mariti, and to her children in fee; and an action having been brought by her to compel the proprietor to execute the deed accordingly;—Held, (reversing the judgment of the Court of Session), That there was no evidence of the trust to affect the proprietor, and that he was not bound to execute the feu-charter so demanded.—No. 27. p. 334.

———A party having, by a trust-deed, conveyed his whole funds, interest, and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir-at-law and of taillie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied

TRUST continued.
the trustees from the claim;—The House of Lords remitted to take the opinion of all the Judges.—No. 31. p. 414.*
———A party who had executed a deed of entail, having also made a trust-deed of settlement, or will, by which he appointed his trustees, after paying certain legacies and annuities to particular persons, 'to lay out the residue of the trust-funds, interest and proceeds thereof,' in purchasing lands to be annexed to his entailed estate, for the behoof of the heirs of entail seriatim, the trustees being paid out of the *trust-estate* the expenses disbursed by them in relation to the trust; and the first heir of taillie, who was also heir at law, having claimed the interest of the fund not invested in land, from and after the expiration of twelve months from the death of the truster;—Held, (reversing the judgment of the Court of Session), 1st, That as the trust-deed imported a gift to the several heirs of entail of the residue of the funds thereby conveyed, and which were to be invested in land for their behoof; therefore each of them, including the appellant, was entitled to the interest and proceeds of the trust-funds arising from and after the period of twelve months, usually allowed by the law of Scotland for payment of legacies, until the whole of these trust-funds, together with the interest prior to the twelve months, should be invested in land, in terms of the deed; 2d, That these trust-funds, including the interest prior, but not subsequent to the expiration of the twelve months, were subject to the expenses of the trust; and, 3d, That the interest arising subsequent to the above period, was chargeable with the expenses of the collection and application thereof, and also with those of the appeal.—No. 54. p. 614.†
———See *Testament.*
TRUSTEE.—See *Bankrupt.*
TUTOR AND CURATOR.—See *Idiotry and Furiosity.*
USAGE.—See *Burgh Royal.*
WITNESS.—See *Writ.*
WRIT.—Held, (affirming the judgment of the Court of Session), That it is a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the granter subscribe nor heard him acknowledge his subscription.—No. 19. p. 166.
———— See *Reduction.*

* See, for the subsequent procedure, 5. Shaw and Dunlop, No. 248. p. 476. and post. p. 614.

† This is the concluding part of the case reported p. 414.

Stanford Law Library
3 6105 063 371 749